

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
WESTERN DIVISION

DR DISTRIBUTORS, LLC, ) Docket No. 12 CV 50324  
)  
Plaintiff-Counterdefendant, ) Rockford, Illinois  
) Wednesday, October 30, 2019  
v. ) 9:00 o'clock a.m.  
)  
21 CENTURY SMOKING, INC. )  
and BRENT DUKE, )  
)  
Defendants-Counterplaintiffs, )  
)  
CB DISTRIBUTORS, INC. and )  
CARLOS BENGUA, )  
)  
Counter-Defendants. )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE IAIN D. JOHNSTON  
VOLUME 2 - PAGES 305 - 573

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20 Also Present: MR. SEAN BYRNE  
21 MR. FRED CHAPEKIS  
22 MR. THOMAS R. LEAVENS  
23 MS. HEATHER R. LIEBERMAN VAN DYKE  
24 MR. TRAVIS W. LIFE  
25 MR. STEVEN S. SHONDER  
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1           THE CLERK:   Calling 12 CV 50324, DR Distributors,  
2   LLC v. 21 Century Smoking, Inc.

3           THE COURT:   All right.   Let's just show the same  
4   appearances.   There is nobody new.

5           All right.   We left off in the examination of  
6   Mr. Duke.   When we are done with Mr. Duke's examination, I  
7   just want to go through and double-check to make sure whatever  
8   exhibits are admitted correspond with what everybody else has,  
9   so we are all on the same page as far as admitted exhibits go,  
10   okay?

11          All right.   Before you resume your examination of  
12   Mr. Duke, anything else we need to address?   I know I have  
13   received sort of random, stray exhibits.   We will try to keep  
14   track of them.   I have got -- somebody's copies were put on  
15   top.

16          MR. SMITH:   Those are our additional exhibits, the  
17   Leavens Strand lawyers' additional exhibits, your Honor.

18          THE COURT:   Got it.   Okay.   16 through 25.

19          And then I think from Mr. Salam, I know I received an  
20   e-mail from him that those are --

21          THE CLERK:   Those are in the binder.

22          THE COURT:   Actually in the binder.   Okay.   So I have  
23   got everything.

24          All right.   Anything else to talk about procedurally  
25   before we continue?

1 MR. DAVIS: No, your Honor.

2 THE COURT: Okay. How about from you folks?

3 MR. SALAM: Just briefly.

4 THE COURT: Sure.

5 MR. SALAM: I sent your operations assistant an  
6 e-mail yesterday that I believe we will have 4Discovery  
7 available for next Thursday --

8 THE COURT: Okay.

9 MR. SALAM: -- if you want or if defense counsel  
10 wants them depending on where we go today.

11 THE COURT: Okay. All right. Anything else?

12 MR. SMITH: No, your Honor.

13 I guess I do have a concern about the time, and among  
14 my concerns are we have Ms. Liberman Van Dyke here from Texas.  
15 I had hoped we might get to a point where we could suggest,  
16 some part of this, she might not -- I'm worried we are going  
17 past the 7th, your Honor, is what I'm worried about now.

18 THE COURT: There is a club forming.

19 MR. SMITH: Pardon me?

20 THE COURT: There is a club forming. We have  
21 jackets, a secret handshake. It is wonderful.

22 But if we could get Ms. Liberman, so she can move on  
23 with other things she is doing, and figure out how it works  
24 into a schedule, that's fine with me.

25 MR. SMITH: And perhaps something we will discuss as

1 we proceed, but, I mean, I don't want to interfere with  
2 counsels' presentations. On the other hand, it is a matter of  
3 some concern to me.

4 THE COURT: Okay. All right.

5 MR. DAVIS: One item, your Honor. They have just  
6 referenced 16 through 25 exhibits. I think we have received  
7 up to 23. I don't have 24 and 25.

8 MR. SMITH: Yes, we put the extra two tabs in the  
9 notebook just in case something else came up.

10 THE COURT: I was just looking at the tabs. That's  
11 all.

12 MR. SMITH: Everybody is right about what they've  
13 got.

14 THE COURT: So it is 16 through 23, right?

15 MR. SMITH: Yes.

16 THE COURT: Okay. Good.

17 All right. Mr. Duke, have a seat again.

18 Remember you are still under oath.

19 THE WITNESS: Yes, your Honor.

20 DIRECT EXAMINATION (Continued)

21 BY MR. DAVIS:

22 Q. Good morning, Mr. Duke.

23 A. Good morning.

24 Q. I'm going to show you now an exhibit we received for the  
25 first time yesterday from your new attorneys. Can you look at

1 your screen and see Defendants' Exhibit 60? I don't see a  
2 marking on it, but this is how it was produced to me.

3 Do you recognize that document?

4 THE COURT: Hold on one second.

5 And then just as a -- not warning -- reminder,  
6 Heather tops out at 260. Let's make sure she's comfortable  
7 throughout today. It is a long day for her, okay?

8 THE WITNESS: Thank you, your Honor.

9 MR. SALAM: Your Honor, if need be, I have extra  
10 copies.

11 THE COURT: I have got it on the screen. Thank you.

12 All right. Go ahead, Mr. Davis. I apologize.

13 MR. DAVIS: Thank you, your Honor.

14 BY MR. DAVIS:

15 Q. Mr. Duke, do you recognize the exhibit on the screen,  
16 Defendants' Exhibit 60?

17 A. Yes.

18 Q. And you authorized this document to be disclosed in this  
19 case?

20 A. Yes.

21 Q. And this is an e-mail between you and your prior attorney  
22 Travis Life, right?

23 A. Correct.

24 Q. So what does this e-mail mean?

25 MR. SALAM: Object to the form of the question, your

1 Honor.

2 THE COURT: What's the matter with the form?

3 BY MR. DAVIS:

4 Q. Does this --

5 THE COURT: I don't know -- what's the matter with  
6 the form? It is his document, right? I think you are talking  
7 about --

8 MR. SALAM: "What does it mean?" Is it "What are you  
9 talking about here?" or something like that?

10 THE COURT: Do you understand the question was what  
11 are you trying to convey?

12 THE WITNESS: It is a little vague.

13 THE COURT: Okay. Go ahead. What were you trying to  
14 convey with this e-mail?

15 THE WITNESS: I was unaware that the e-mails were  
16 purging from my GoDaddy e-mail accounts.

17 BY MR. DAVIS:

18 Q. And does this e-mail refresh your recollection as to when  
19 you first learned of the auto-purge problem?

20 A. No.

21 MR. SALAM: Objection, your Honor, foundation. He  
22 hasn't testified --

23 THE COURT: It is a foundational question.  
24 Overruled.

25 THE WITNESS: No, this does not necessarily refresh

1 my memory.

2 BY MR. DAVIS:

3 Q. All right. Is this e-mail truthful and accurate?

4 A. As you scroll to the next page, yes, this does help  
5 refresh my memory. That first page did not, but this page  
6 does.

7 Q. All right. So you are looking at the entire Exhibit 60,  
8 not just a part of it. That does refresh your recollection  
9 about when you first learned of auto-purge; is that right?

10 A. Yes.

11 Q. And these are e-mails you exchanged with your  
12 attorney -- your prior attorney Mr. Life, right?

13 A. Correct.

14 Q. And so this means the auto-deletion ended on what date,  
15 sir?

16 A. What date did I correct it, or what date was the  
17 last -- does the last e-mail exist?

18 Q. We will take both.

19 A. I believe the correction was in June of 2015. According  
20 to here, my last e-mail would be 11/22 of 2014.

21 Q. So you made the correction in June of 2015?

22 A. Correct.

23 Q. And that's a month after the e-mail where you -- this  
24 e-mail, Defense Exhibit 60, where you became aware of the  
25 problem, right?



1 MR. SALAM: Objection, your Honor, to -- his  
2 testimony is that he became aware of it in June of 2015.

3 THE COURT: Just tell me the form.

4 Look, as I said the last time, object, tell me a rule  
5 anywhere in FREs or a basis.

6 MR. SALAM: Misstates the testimony.

7 THE COURT: Okay. It is cross-examination. It is a  
8 fair question.

9 Overruled.

10 If you can answer the question, I think you will know  
11 how to say that.

12 So do you want to have the question reread, or do you  
13 just want to restate it?

14 MR. DAVIS: I will restate it.

15 THE COURT: Okay.

16 BY MR. DAVIS:

17 Q. I want to understand: This e-mail refreshes your  
18 recollection as to when you first became aware of the  
19 auto-purge problem with your e-mail account, right?

20 Isn't that what you just said?

21 A. Yes.

22 Q. All right. And the date of this e-mail is what?

23 A. May 14th, 2018.

24 Q. And when did you make the correction to the settings on  
25 your e-mail account to fix this problem?

1 A. June of 2015.

2 Q. Okay. So it wasn't sometime in 2014, as you stated in a  
3 sworn declaration you filed with the court in April 2018,  
4 right?

5 A. Correct.

6 Q. And it's not on June 29th, 2015, that you testified to  
7 about Monday under oath in this courtroom, right?

8 A. I just said June of 2015.

9 Q. Yes. But on Monday, you said that's when you first became  
10 aware of it, on June 29th, 2015, right? That's what you said  
11 in this court?

12 A. And that's what I said just now.

13 Q. You just said, and this is your e-mail that says in May of  
14 2018, you became aware of an auto-purge problem, right?

15 A. Approximately May of 2015. Approximately. This was a  
16 guess. This was not -- this was not the e-mail that shows the  
17 date. This was an approximate guess based on a six-month time  
18 frame. I was doing math. I said 11/22/14. My best guess is  
19 May.

20 THE COURT: All right. Hold on.

21 Again, this isn't stuff I should have to do.

22 Mr. Duke, just so you know, if your attorney objects,  
23 just hold on.

24 THE WITNESS: Okay. I'm sorry, your Honor.

25 THE COURT: Look, you aren't familiar with the rules,

1 so don't worry about that.

2 Just hold on.

3 If there is an objection, then I can rule on the  
4 objection, and then we can move forward, so we have a clean  
5 record, and then, again, Ms. Perkins-Reiva can only type down  
6 one person talking at a time. So I will try to, you know, put  
7 the brakes on. But if you hear an objection, just hold on,  
8 and we will go from there.

9 THE WITNESS: Sorry.

10 THE COURT: You don't have anything to apologize for.  
11 Don't worry about it.

12 Go ahead.

13 MR. DAVIS: Thank you.

14 BY MR. DAVIS:

15 Q. So looking at the page that's on your screen from Defense  
16 Exhibit 60, this is your e-mail, right?

17 Do you see in the middle it says "From: Brent Duke"?

18 A. Correct.

19 Q. "To: Travis Life"?

20 A. Correct.

21 Q. What's the date of that e-mail?

22 A. May 14th, 2018.

23 Q. So May 14th, 2018, right, you are talking about the date.

24 The content of this talks about when you first learned and  
25 became aware of the problem, right?

1 A. Correct.

2 Q. All right. And it says -- well, why don't you read the  
3 second line starting with the word "meaning."

4 A. "Meaning that I would have discovered this issue in,  
5 approximately, May of 2015 if that six months is correct."

6 Q. Right.

7 And this is your e-mail from May 14th of 2018, right?

8 A. Correct.

9 Q. Okay. And a date in May of 2015 is not June 29th, 2015,  
10 that you testified about on Monday, right?

11 A. Approximately May, I would say, is June, yes.

12 "Approximate" does not mean exact.

13 Q. Okay. And so this call in May would have not been on the  
14 day you supposedly called GoDaddy and spoke to them about it  
15 for the first time on June 29th, 2015, right?

16 A. I don't even understand what you are asking at this point.

17 Q. Do you recall your testimony on Monday?

18 A. Yes.

19 Q. Do you recall talking about calling GoDaddy to talk to  
20 them about this problem with the auto-purge from your e-mail?

21 A. Yes, I don't think I maybe called GoDaddy. I called  
22 GoDaddy in June of 2015. I'm positive of that.

23 Q. You testified that you called them on June 29, 2015,  
24 because you had an e-mail, and we showed it to you. You have  
25 an e-mail from GoDaddy, and you said that refreshed your

1 recollection as to when you called them, right?

2 A. Yes, that's correct.

3 Q. Okay. And you said on Monday that's when you first  
4 learned of the auto-purge?

5 A. Correct.

6 Q. Okay. But this e-mail that you just produced yesterday  
7 for the first time, right, it says a different date, right?  
8 It says May of 2015?

9 A. Incorrect.

10 Q. So --

11 A. It says "approximately May."

12 Q. Okay. So you are dissembling it, so when you put the word  
13 "approximately" on it, your recollection is that this e-mail  
14 you sent doesn't reflect the actual date; is that right?

15 A. It is a guess.

16 Q. It is a guess?

17 A. An approximate, yes.

18 Q. And that's like you are doing today, is guessing, right?

19 A. No. I'm saying, no, I am not guessing today.

20 Q. So on May 14th of 2018, right, you didn't know the date  
21 you contacted GoDaddy, right?

22 A. It is pretty close.

23 Q. Okay. And after you testified under oath on Monday about  
24 this issue, we now have this new e-mail with a different date,  
25 right?

1 For the first time, we are seeing this today?

2 THE COURT: If he knows.

3 MR. DAVIS: If you know.

4 THE COURT: I don't know if he knows that's the first  
5 time you are seeing it, but I take your -- I take you at your  
6 word this is the first time it has been dropped on you. Okay.

7 THE WITNESS: I don't think "approximately May" is a  
8 different date than June. So I would disagree with that  
9 statement.

10 BY MR. DAVIS:

11 Q. All right. And nowhere in this e-mail does it say "I  
12 called GoDaddy on June 29th to get an answer, and that's when  
13 I first became aware of the auto-purge problem," right?

14 A. Correct.

15 Q. Okay. And who was the first attorney you told about the  
16 problem with auto-purge?

17 A. That I do not recall.

18 Q. Okay. And now I want to get really clear on something.  
19 On Monday, if I recall your testimony, you said you didn't  
20 understand what a court order was; was that right?

21 A. I don't understand what a court order is?

22 Q. Yes.

23 You said, "I don't understand what court orders are."

24 Did I understand your testimony right?

25 A. I don't recall saying that. I don't know.

1 Q. Do you know what a court order is?

2 A. When a court orders you to do something would be my guess.

3 Q. Right.

4 And you said, "I didn't know about court orders in  
5 this case," if I recall your testimony right; is that right?

6 A. That's kind of ambiguous. I may have been saying I don't  
7 know about every court order that existed.

8 Q. Right.

9 Do you understand what a court order is?

10 A. An order given by the court would be my guess.

11 Q. Okay. And do you have to obey that order?

12 A. Absolutely.

13 Q. All right. And do you know what it means to testify under  
14 oath in a courtroom?

15 A. Yes.

16 Q. Okay. You understand it means to tell the whole truth,  
17 right, not just a part of it that fits your excuse in this  
18 case?

19 Do you understand that?

20 A. Yes.

21 Q. Okay. And you have been aware of the motion for sanctions  
22 that our clients filed against you and your company for over a  
23 year and a half, right?

24 A. Correct.

25 Q. And you said you prepared for this hearing with your new

1 attorneys?

2 A. Yes.

3 Q. Yet you just produced a new document that contradicts the  
4 testimony you gave on Monday about the date that you became  
5 first aware of auto-purge; isn't that right?

6 A. You are totally misstating what I said.

7 Q. All right.

8 A. So, no, I do not believe this contradicts anything I said.

9 Q. Okay. I guess we will let the record speak for itself,  
10 then, based on your testimony Monday and this new document.

11 But you use a smartphone, Mr. Duke?

12 A. Yes.

13 Q. What kind of smartphone?

14 THE COURT: Well, now, I need some foundation. What  
15 time frame?

16 MR. DAVIS: Today.

17 THE WITNESS: Today, I have a Samsung Galaxy and an  
18 iPhone.

19 BY MR. DAVIS:

20 Q. And have you been using smartphones since 2009?

21 A. I don't recall. I gave a list of the phones that I was  
22 using in the most recent discovery. I don't recall if they  
23 were all smartphones.

24 Q. But you have had smartphones since that time, right?

25 A. I literally just said I gave a list of all the phones I



1 have been using. I don't recall if they were all smartphones.

2 Q. Right. And I didn't ask you if you gave a list to anyone.

3 I asked you if you used a smartphone starting in 2009.

4 MR. SALAM: Objection, your Honor, asked and

5 answered. My client is being clear.

6 THE COURT: Okay. His testimony is "I don't recall

7 if they were all smartphones." So he doesn't know if they

8 were all smartphones.

9 MR. DAVIS: All right.

10 BY MR. DAVIS:

11 Q. And is it the case that since 2009, you have used some

12 sort of phone that you were able to access your e-mail

13 accounts on?

14 A. I believe you could access e-mail on most phones I have

15 had since 2009, yes.

16 Q. All right. And that when you access your e-mail, that's

17 your Yahoo! account and your GoDaddy accounts on your phone,

18 right?

19 A. GoDaddy never had the best app for phone use, so I would

20 probably have used my phone more for Yahoo! e-mails.

21 Q. All right. And that was -- and you would send and receive

22 e-mails on your phone?

23 A. Correct.

24 Q. Okay. And you did that -- from the time you had a

25 smartphone in 2009 to the present time, you have been doing

1 that, using your Yahoo! e-mail account?

2 A. That sounds right.

3 Q. Okay. Now, let's go back to Ms. Wood. Do you remember  
4 talking about that customer named Ms. Wood on Monday?

5 A. Yes.

6 Q. And I want to focus you on the e-mails you exchanged with  
7 her.

8 We know from all the e-mails that you produced with  
9 your communications with your lawyers that at least on two  
10 occasions, your attorneys asked you to look and find those  
11 e-mails, right, the ones that you exchanged with Ms. Wood?

12 A. Yes.

13 Q. And they asked you for all the e-mails with her, right?

14 A. I believe so, yes.

15 Q. And you couldn't find them, right?

16 A. Correct.

17 Q. And they were never produced in this case, right?

18 A. I'm unsure of what was produced.

19 Q. Okay. And in one of the e-mails we saw on Monday, you  
20 said you had hundreds of e-mails with -- sorry, strike that.

21 At the time -- we were looking at an e-mail where you  
22 mentioned hundreds of e-mails with Kirti Saraswat, and at that  
23 same time, your attorney was asking you to look for the Wood  
24 e-mails, right? That's one of those e-mails?

25 A. Correct.

1 Q. All right. And you have known about this problem with the  
2 lost Wood e-mails for about two years, right, and you still  
3 can't produce those documents; isn't that true?

4 A. I'm unsure what my attorneys have been able to find, so I  
5 don't know if it is true or untrue.

6 Q. Right.

7 But prior to your new attorneys and prior to June of  
8 this year, you have been unable to find the Wood e-mails,  
9 right?

10 A. We have issues with our sent e-mails, we know. So, yes, I  
11 have had difficulty finding some of these e-mails.

12 Q. And we know from your testimony on Monday that the only  
13 way your lawyers could -- prior attorneys could get e-mails is  
14 from you, right?

15 A. That's correct.

16 Q. And we know that they asked you on those two prior  
17 occasions to find those, and they weren't produced, right?

18 A. Some were produced is what I believe you said.

19 Q. Right.

20 A. So I think that some were produced.

21 Q. The ones that you just confirmed you couldn't find, you  
22 are the one that couldn't find them, right, not your  
23 attorneys?

24 A. Correct.

25 Q. Yes.

1                   And you are the one who looked for them and didn't  
2 find them and didn't produce them, right?

3     A.   Correct.

4     Q.   Okay. And we have the e-mails where your attorney is  
5 asking for them, and the e-mails that we do have, the ones  
6 that you didn't produce, that we do have, are the ones from  
7 Plaintiff, right, because Ms. Wood sent them to my client.

8                   Do you recall that?

9     A.   Thankfully, yes.

10    Q.   Yes.

11                  But you have looked at that Plaintiff's Exhibit 69,  
12 right? I'm going to have that shown to you now.

13    A.   Yes, absolutely.

14    Q.   And you say "thankfully," and that's because you couldn't  
15 find them, right?

16    A.   Yes.

17    Q.   Yes.

18                  And you lost them, right?

19    A.   I don't know that I lost them.

20    Q.   Okay. But up until June of 2018, you didn't produce them,  
21 right, all the Wood e-mails? You just confirmed that in your  
22 testimony.

23    A.   You told me that the other day. I'm not arguing that you  
24 are correct. You said there were two e-mails that were  
25 produced by us. They were not all produced. That's what you

1 said two days ago. So I'm not arguing with your assessment of  
2 the situation.

3 Q. You are agreeing with it?

4 A. Yes, I don't have any reason not to.

5 Q. Okay. And you have seen this Plaintiff's Exhibit 69,  
6 right?

7 A. Yes.

8 Q. It was produced long ago in this case, right?

9 A. Yes.

10 Q. And you reviewed it as you prepared for your testimony  
11 today?

12 A. Yes.

13 Q. Okay. And this is an e-mail string between you and  
14 Ms. Wood, right?

15 A. Yes.

16 Q. Do you dispute the accuracy of these e-mails?

17 A. No reason not to.

18 Q. All right.

19 A. Or no reason to dispute them.

20 Q. Okay. And these are e-mails sent to your GoDaddy e-mail  
21 inbox account, right?

22 A. Do you have --

23 Q. Yes, let's take a look at some of them.

24 All right. You are receiving e-mails from Ms. Wood,  
25 right?

1 A. "Website Inquiry from 21 Century Smoking" would indicate  
2 to me that she did it through our website. She didn't send us  
3 an e-mail; hence, we wouldn't be replying to her; hence, there  
4 could be missing sent e-mails from us.

5 THE COURT: You said -- hold on one second.

6 Okay. I see it now, "Subject: Website Inquiry."

7 THE WITNESS: So it is coming from the website. It  
8 is not coming from her directly.

9 BY MR. DAVIS:

10 Q. Well, let's look at the page that's on the screen, which  
11 is DRSTCS 5273.

12 A. Yes.

13 Q. In the middle where it says "Original Message," right?

14 A. Yes.

15 Q. What is the subject?

16 A. "Website Inquiry from 21 Century Smoking."

17 Q. Okay. That's not the sender, right?

18 A. Correct.

19 Q. Okay. And the e-mail is from who?

20 A. D.S. Wood. debra@rdinc.us.

21 Q. Oh, I see. You are at the bottom of the screen. Okay. I  
22 understand now.

23 A. Yes.

24 Q. So let's stay with that example. That's at the bottom.

25 That is from D.S. Wood.

1 MR. DAVIS: Can we go back one page?

2 Thank you.

3 BY MR. DAVIS:

4 Q. That is D.S. Wood. What's the date of the e-mail?

5 A. June 20th, 2013.

6 Q. Right.

7 And who is the e-mail to?

8 A. support@21centurysmoking.

9 Q. .com, right?

10 A. Correct.

11 Q. That is your GoDaddy e-mail account?

12 A. Correct.

13 Q. And that's sent to the inbox of that account, right?

14 A. Yes.

15 Q. And if you look further up the screen, the next e-mail in  
16 the string, do you recognize that one?

17 A. Yes.

18 Q. And the subject says what?

19 A. "Re: Website Inquiry from 21 Century Smoking."

20 Q. And the e-mail is from who?

21 A. Debra Wood.

22 Q. Okay. And that's her e-mail address there?

23 A. Yes.

24 Q. And what's the date of the e-mail?

25 A. June 20th, 2013.

1 Q. And who is it to?

2 A. support@21centurysmoking.com.

3 Q. Right.

4 So this is not -- those two e-mails are not to some  
5 website inquiry inbox, right? They are to your GoDaddy e-mail  
6 account, right?

7 A. She is not directly e-mailing us in that first case. She  
8 is doing it through the website.

9 Q. So even though the e-mail says it is to  
10 support@21centurysmoking.com, your testimony is that was not  
11 to your support@21centurysmoking.com e-mail account?

12 A. Yes, I am saying she did not write subject matter "Website  
13 Inquiry from 21 Century Smoking," correct.

14 Q. I don't understand your answer.

15 A. She did not write "Website Inquiry from 21 Century  
16 Smoking" as a subject matter. She did it to the website and  
17 then it came to the support inbox.

18 Q. Have you spoken to Debra Wood?

19 How do you know what she wrote?

20 A. Because that's how e-mails come when they are done through  
21 the website.

22 Q. Right.

23 A. Through the 21 Century Smoking website.

24 I apologize.

25 Q. Got you. Understood.



1 All right. But the question you didn't answer is  
2 both of these e-mails are sent to your -- that's  
3 you -- support@21centurysmoking.com GoDaddy e-mail account,  
4 right?

5 Do you dispute that from this document?

6 A. I am unsure where the confusion is. The first e-mail is  
7 definitely not sent directly to our website.

8 Q. So stop right there. Let me interrupt you because I want  
9 to understand this.

10 It says in the e-mail "From," "Date," and "To." It  
11 says: "To: support@21centurysmoking.com."

12 Do you dispute and deny that this e-mail was sent to  
13 your support@21centurysmoking.com inbox in your GoDaddy e-mail  
14 account on or about June 20th of 2013?

15 A. I'm just saying it was not sent from her. The program  
16 automatically sent it to us. She put in a complaint or a  
17 comment through our website and then it came to our  
18 support@21centurysmoking e-mail account.

19 Q. So even if she didn't do what you just said, it came into  
20 your GoDaddy e-mail inbox at support@21centurysmoking.com?

21 A. Yes, absolutely, yes. That's where it ended up, yes.

22 Q. Okay. And that's the same for every e-mail in PX-69 where  
23 it says: "To: support@21centurysmoking.com," right?

24 A. No, the next one, she definitely is replying to the  
25 message that we have sent back to her. So the next one, I

1 believe, she is directly sending to us. The first one, she is  
2 not sending directly. The second one she is sending directly  
3 is what I'm seeing when I look at this.

4 Q. Got it.

5 So the bottom one didn't go directly into your  
6 support@21centurysmoking.com inbox in your GoDaddy e-mail  
7 account. It did get there though, right?

8 A. Correct, yes.

9 Q. And the other ones all went directly in, right?

10 A. I would have to see the other ones. The one I'm looking  
11 at here, it looks like one was not sent directly to us. One  
12 was sent directly to us.

13 Q. But they all, everything -- and you have reviewed this.  
14 You have had it for a couple of -- you know that all of the  
15 e-mails that you exchanged with Ms. Wood ended up in your  
16 inbox, right, your support@21centurysmoking.com inbox on your  
17 GoDaddy e-mail account; is that right?

18 A. Yes, for sure, those two definitely did.

19 Q. And I'm asking you about the rest of them.

20 You have had this document for years, and you  
21 reviewed it to prepare for today, right?

22 Do you dispute anything in this string of e-mails  
23 with the customer, Ms. Wood?

24 MR. SALAM: Your Honor --

25 MR. DAVIS: I'm asking the question.

1 THE COURT: Hold on.

2 MR. DAVIS: If you have an objection, state it.

3 THE COURT: Stop. Stop.

4 This is the third or fourth time I have said this:

5 This is not your first rodeo, folks. Let him finish the  
6 question. You object. I will rule. Witness answers. Do we  
7 got that, or do we need to say it all together?

8 Finish, objection, rule, answer.

9 Let him finish the question. It is an objectionable  
10 question currently, but wait until he is done with it. Make  
11 your objection. I will sustain it. He will rephrase it. The  
12 witness will answer.

13 Go ahead.

14 There is a lot in that question. It's compound.

15 BY MR. DAVIS:

16 Q. Do you dispute the accuracy of any of the e-mails that are  
17 contained in Plaintiff's Exhibit 69?

18 MR. SALAM: Objection, your Honor, asked and  
19 answered.

20 THE COURT: Okay.

21 THE WITNESS: As I said previously, I have no reason  
22 to dispute these e-mails.

23 MR. DAVIS: We move Exhibit 69 into evidence.

24 MR. SALAM: No objection, your Honor.

25 THE COURT: Okay. 69 will be admitted.

1                   Okay. Thank you.

2           (Plaintiff's Exhibit 69 was offered and received in  
3           evidence.)

4   BY MR. DAVIS:

5   Q. Now, I want to go back to something else you said on  
6   Monday. If I recall your testimony, you said something in  
7   connection with these Wood e-mails that -- on Monday, you said  
8   it would be unjust for you to have to produce all of these  
9   confusion e-mails.

10                   Did I recall your testimony correctly?

11   A. I don't recall saying that.

12   Q. In your testimony, did you say it would be unjust for you  
13   to have to produce all of the customer confusion e-mails that  
14   you sent and received in this case?

15   A. I don't believe I said that.

16   Q. Did you say that somehow it would be unfair for you to  
17   have to find them all and produce them all, even the ones that  
18   were critical of you?

19   A. I do not recall saying anything of the sort.

20   Q. Okay. So you don't recall your testimony that somehow  
21   your excuse in not producing them all was sort of out of  
22   fairness to you, right?

23                   MR. SALAM: Objection -- I withdraw the objection.

24                   THE COURT: All right. Go ahead and respond. Can  
25   you --

1                   THE WITNESS: I mean, that sounds like a  
2   mischaracterization of something I said. I have no clue what  
3   you are --

4   BY MR. DAVIS:

5   Q. You don't remember your testimony from Monday?

6   A. I don't recall saying anything like that.

7   Q. Okay. And you are the one that chose not to produce all  
8   of the e-mails with Ms. Wood, right, even though your lawyers  
9   asked for it previously?

10   A. I produced whatever I found.

11   Q. Okay. Now, let's go to Mr. Edmiston. I want to turn your  
12   testimony back to the e-mails you exchanged with him.

13                   Do you recall that testimony?

14   A. Yes.

15   Q. Okay. Now, despite getting numerous e-mails from  
16   Mr. Edmiston, including an e-mail with a second recording  
17   attached to it, your testimony on Monday was that you only  
18   told your attorneys about the second recording orally, right?

19   A. I may have e-mailed them, too, but I notified them of a  
20   second recording through e-mail and I believe verbally.

21   Q. You say you told them. You told them verbally about the  
22   second recording, right?

23   A. For sure, yes.

24   Q. Okay. For sure?

25   A. I believe so, yes.

1 Q. All right. Well, all of your attorneys are here listening  
2 to your testimony, so let's be clear.

3 Which attorney did you tell?

4 A. I do not recall who I told.

5 Q. What did you tell them?

6 A. That there were two recordings from Bill Edmiston.

7 Q. And when did you tell them that?

8 A. Whatever day Bill told me.

9 Q. And how would you know what date that is?

10 A. If I had the e-mail from Bill telling me.

11 Q. That would be the only thing you would look at, right?

12 A. That would be the best way to figure it out, yes.

13 Q. Okay. And just to confirm, you never sent your attorneys  
14 an e-mail with the second recording, right?

15 A. Correct.

16 Q. Okay. And you know from reviewing our motion for  
17 sanctions that the second recording is attached to an e-mail  
18 that you received from Mr. Edmiston in your Yahoo! e-mail  
19 account, right?

20 A. I believe it went to the bduke@21centurysmoking, which  
21 ends up in the Yahoo!, but, yes, I did receive it.

22 Q. Can you say your answer one more time?

23 A. I believe that it went directly to the  
24 bduke@21centurysmoking.com e-mail, which then forwards to the  
25 Yahoo! e-mail. So he didn't send it to the Yahoo! e-mail, but

1 I do have it in the Yahoo! e-mail, yes.

2 Q. Okay. And we only know about the existence of this e-mail  
3 with the second recording attached because you were ordered to  
4 produce -- and finally produced -- your Yahoo! e-mail accounts  
5 that were subject to the ESI terms on or about June 1 of 2018,  
6 right?

7 MR. SALAM: Objection, your Honor, to the form of the  
8 question. He is saying "we only know." I'm not sure who he  
9 is referring to.

10 THE COURT: I will sustain it.

11 BY MR. DAVIS:

12 Q. The Plaintiffs in this case and the court only know about  
13 you having the second recording in your inbox because you were  
14 ordered to produce your Yahoo! e-mail accounts responsive to  
15 the ESI terms in June of 2018, right?

16 MR. SALAM: Objection to the form of the question.

17 THE COURT: If you know.

18 THE WITNESS: I suppose so, yes.

19 BY MR. DAVIS:

20 Q. And in that conversation you had with your attorney, was  
21 it one conversation that you had about disclosing the second  
22 recording to your attorneys -- your prior attorneys?

23 A. No. I mean, I believe we were looking for it on multiple  
24 occasions, not just once.

25 Q. I'm sorry.

1 A. It was not just once. I believe we were looking for it on  
2 multiple occasions.

3 Q. And you told them on multiple occasions that the second  
4 recording existed?

5 A. Yes, I believe that it existed, yes.

6 Q. Yes.

7 THE COURT: But the question is: Did you tell your  
8 attorneys on multiple occasions that it existed?

9 Do you understand the distinction there?

10 THE WITNESS: Yes, I don't remember how many times I  
11 told them it existed. I know we were looking for it on  
12 multiple occasions. I do not know how many times I told them  
13 that it existed.

14 THE COURT: Okay. Go ahead, Mr. Davis.

15 BY MR. DAVIS:

16 Q. All right. And what did you tell your prior attorneys  
17 about the content of the second recording?

18 A. I can't really have described content when I didn't ever  
19 hear it. I didn't know what was on it.

20 Q. So you personally had never heard it?

21 A. I personally didn't know it existed until I was made aware  
22 of it through these recent occurrences.

23 Q. All right. But it is your own e-mails that disclose a  
24 second recording exists, and you received it just a few  
25 minutes after you received the first recording from



1 Mr. Edmiston based on your own e-mails, right, in 2013?

2 Isn't that true?

3 A. Correct.

4 Q. So let's take a look at that exhibit right now. That's  
5 Plaintiff's Exhibit 23.

6 MR. DAVIS: I ask that to be shown.

7 BY MR. DAVIS:

8 Q. For the record, this is an October 2nd, 2013, e-mail from  
9 Mr. Edmiston to Mr. Duke. It is from the Defendants' June 1,  
10 2018, production. The paper copy is Bates-stamped  
11 21C 1007924-1007925.

12 THE COURT: All right. Hold on one second while it  
13 comes up on the screen.

14 I assume you have it in front of you now, Mr. Duke?

15 THE WITNESS: Yes, your Honor.

16 THE COURT: Okay. Go ahead.

17 MR. DAVIS: And there we go.

18 Thank you.

19 BY MR. DAVIS:

20 Q. You see Plaintiff's Exhibit 23 clearly now?

21 A. Yes.

22 Q. Do you recognize it?

23 A. Yes.

24 Q. That's the e-mail you got from Mr. Edmiston?

25 A. Correct.

1 Q. And it was on October 2nd, 2013?

2 A. Correct.

3 Q. Right.

4 And it came to your GoDaddy e-mail account, bduke@?

5 A. Correct.

6 Q. Okay. And it was also in your Yahoo! e-mail account,

7 right?

8 A. Yes, that's correct.

9 Q. Okay. And you see the attachments, right?

10 A. Yes.

11 Q. And what's the first attachment?

12 A. IMG\_0118.MOV (5.27 MB).

13 Q. Right.

14 And is there another attachment?

15 A. Untitled attachment 98542.txt (25 bytes).

16 Q. All right. And what's the message from Mr. Edmiston to  
17 you?

18 A. "S. Video too long to send, but I have it."

19 Q. All right. So he is sending to you an attachment here,  
20 right?

21 A. Correct.

22 Q. And this is the second recording, right, not the first  
23 one?

24 A. I believe so, yes.

25 Q. That's right.

1                   And this is the e-mail you never forwarded to your  
2 attorneys, right?

3 A. Correct.

4 Q. And on Monday, you also said you got lots of e-mails from  
5 Mr. Edmiston, right?

6 A. Over the time -- and what time frame?

7 Q. In this time, in 2012 and 2013.

8 A. Yes, yes, there is a lot of e-mails from Bill Edmiston.

9 Q. Yes.

10                   And you were deciding, going through them, trying to  
11 pick through them, because you said they always had like a  
12 business card attached to it, so it was hard to tell what  
13 attachments were on the e-mail?

14                   Was that your testimony on Monday?

15 A. What I'm saying is every single e-mail he sends me appears  
16 to have an attachment. So I don't look at the bottom of every  
17 e-mail of his because every single one has this business card  
18 attachment.

19 Q. And you were on notice several times by e-mail that the  
20 second recording existed, right?

21                   You would just look at the e-mails from Mr. Edmiston.  
22 They are in your Yahoo! e-mail box, right?

23                   You saw them, right?

24                   This has a specific file attached with a file number,  
25 right? Look at the exhibit.

1 A. Correct.

2 Q. Right.

3 That's not a business card, right?

4 A. Correct.

5 Q. Okay. And that is a large file, is it not, 5.27

6 megabytes?

7 A. Yes, it is.

8 Q. Okay. And it's the recording your attorneys were asking

9 you for, right, the second recording?

10 A. Yes, it is.

11 Q. And it was important to your defamation case in this case

12 against my clients, right?

13 A. I do not know.

14 Q. You don't know if these recordings were important to your

15 defamation case?

16 A. No, I do not know if they are important to the defamation

17 case.

18 Q. But you asked Mr. Edmiston to go to the trade show, right?

19 You know which one, the Global Gaming Expo, to try and record

20 my client saying something about you and your company, right?

21 A. Incorrect.

22 Q. You didn't exchange those e-mails with Mr. Edmiston asking

23 him to go to the trade show?

24 A. Incorrect. I did not ask him to go to a trade show.

25 Q. You stand by that testimony here today in court under

1 oath?

2 A. That I asked Bill Edmiston to go to a trade show?

3 Q. Correct.

4 A. Correct, yes, I did not ask him to go to a trade show.

5 Q. Did you send him an e-mail asking him to go to make a  
6 recording?

7 MR. SALAM: Object, your Honor, that wasn't -- I'm  
8 sorry, I withdraw the objection.

9 THE COURT: Okay. Go ahead.

10 Why don't you rephrase it -- or just restate it, not  
11 rephrase it, or I can read it back.

12 "Did you send him an e-mail asking him to go to make  
13 a recording?" That's the question.

14 THE WITNESS: This is hard to answer for me, your  
15 Honor. I don't know exactly.

16 I don't understand the question.

17 THE COURT: Okay. Well, my understanding of his  
18 question is did you send Bill Edmiston an e-mail saying "Go to  
19 this trade show in Vegas." That's my understanding of the  
20 question.

21 If you want to restate it or rephrase it, go ahead.

22 MR. DAVIS: I will take that question first.

23 BY MR. DAVIS:

24 Q. Do you understand the Judge's question?

25 A. I absolutely understand that question.

1 Q. And your answer is?

2 A. The answer to that one is no.

3 Q. You didn't ask him to go, right?

4 A. I have never asked Bill Edmiston to go to any trade show  
5 ever.

6 Q. But you knew he was going to the trade show, right?

7 A. He goes to thousands of trade shows.

8 Q. And at or about that time, you send him an e-mail saying:  
9 "Go and try and record the Plaintiffs at the trade show that  
10 you are going to," right?

11 MR. SALAM: Objection, your Honor, on relevance. I'm  
12 not sure where we are going on this.

13 THE COURT: I will overrule. I think I know where  
14 it's going. If it turns out that I'm totally wrong, and it is  
15 irrelevant, I will strike it. I could be wrong.

16 THE WITNESS: Can you repeat the question, please?

17 THE COURT: Sure.

18 Do you want to have it read back?

19 MR. DAVIS: Please.

20 THE COURT: Okay. "And at or about that time, you  
21 send him an e-mail saying: 'Go and try and record the  
22 Plaintiffs at the trade show that you are going to,' right?"

23 THE WITNESS: I made a joke with him about it. I did  
24 not tell him to do anything. I made a joke.

25

1 BY MR. DAVIS:

2 Q. But you acknowledge today that you sent him an e-mail that  
3 asked him to tape the Plaintiffs at the trade show, right?

4 A. As a joke, correct.

5 Q. I'm not asking you whether it was a joke or not a joke.  
6 I'm asking you to acknowledge you sent an e-mail to him asking  
7 him to record Plaintiffs at the trade show. Is that true or  
8 false?

9 A. If it was a joke, I would say it is a little out of  
10 context to say that I asked him to do something.

11 Q. But it is a joke he followed up on, right?

12 A. Correct.

13 Q. And he went to the trade show, right?

14 A. He was already going to the trade show.

15 Q. I don't understand your answer. I asked you if he went to  
16 the trade show, not was he already going or not. I don't  
17 understand your response.

18 A. Because you --

19 Q. Did he go to the trade show?

20 A. Yes, he did.

21 Q. Prior to the trade show, you sent him an e-mail saying  
22 "Tape Plaintiffs," right?

23 A. As a joke, correct, yes, I did.

24 Q. And as a joke, he continued to do it, right?

25 A. Yes, he did.

1 Q. And he sent you the recordings, right?

2 A. Yes, he did.

3 Q. All right. And you are the one that had those recordings,  
4 right, from him?

5 A. Yes, I did have the recordings.

6 Q. Right.

7 And you are the one that didn't send them to your  
8 lawyers, right?

9 A. I suppose I did not send one of them to my lawyers,  
10 correct.

11 Q. And you testified you got lots of e-mails from him and you  
12 picked through the ones to forward to your attorneys, right?

13 MR. SALAM: Objection, your Honor. I don't believe  
14 that was his testimony.

15 THE COURT: Okay. Well, if it is not his testimony,  
16 he can say that.

17 THE WITNESS: Yes, I don't recall saying that.

18 BY MR. DAVIS:

19 Q. All right. But you are the one who decided which Edmiston  
20 e-mails to forward to your attorneys, right, you?

21 A. Correct, yes.

22 Q. Okay. All right. So let's turn to this file that we now  
23 have.

24 MR. DAVIS: We move Plaintiff's Exhibit 23 into  
25 evidence.



1 MR. SALAM: No objection, your Honor.

2 THE COURT: Okay. 23 will be admitted.

3 (Plaintiff's Exhibit 23 was offered and received in  
4 evidence.)

5 MR. DAVIS: Now I'm going to ask for the file to be  
6 played in open court with the court's permission. We have it  
7 listed on our exhibit list as Plaintiff's Exhibit 71.

8 Can you pause it, please?

9 For the record, it's Plaintiff's Exhibit 71. It came  
10 from the Defendants in the native production on May 31st of  
11 2018. When we got the native data, the file is actually  
12 attached to it as it was in Mr. Duke's e-mail account, and we  
13 would like to play it.

14 THE COURT: I have got no problem with hearing the  
15 video or seeing the video.

16 Any objection?

17 MR. SALAM: No objection, your Honor. We will  
18 stipulate to its description and its admission.

19 THE COURT: Okay. All right. Go ahead and play it.

20 (Audio recording played in open court.)

21 BY MR. DAVIS:

22 Q. Did you hear that, Mr. Duke?

23 A. Just now?

24 Q. Just now.

25 A. Yes.

1 Q. Did you understand it?

2 A. Yes.

3 Q. Did you hear any discussion in there about your company?

4 A. No.

5 Q. Did you hear any statements made by the people being  
6 recorded talking about any of your products?

7 A. No.

8 Q. Okay. When is the first time you heard that ever?

9 A. Last year, when it was brought up.

10 Q. Last year, after June of 2018?

11 A. Whenever it was brought up in this case, yes.

12 Q. Okay. Now, I'm going to draw your attention to  
13 Plaintiff's Exhibit 25. This is a September 30th, 2014,  
14 e-mail string between you and Mr. Edmiston. It was produced  
15 on June 1, 2018, at 21C 1013015.

16 Can you look at that and tell me if you recognize  
17 this e-mail?

18 A. Yes, I do.

19 Q. And what is it?

20 A. It's an e-mail from Bill to myself.

21 Q. And in that e-mail, what are you conveying to  
22 Mr. Edmiston?

23 A. Questions that my lawyers had asked.

24 Q. Okay. And which lawyer?

25 A. It says "lawyers." I'm not sure which lawyer in specific.

1 Q. And how would you find out which lawyers asked you the  
2 questions to ask Mr. Edmiston in this e-mail dated  
3 September 30th, 2014?

4 A. I would have to look in my e-mail to see which lawyers  
5 sent those questions.

6 Q. But these were questions from your prior attorneys asking  
7 you to ask Mr. Edmiston; is that right --

8 A. Yes.

9 Q. -- about the recordings he made at the trade show?

10 A. Correct.

11 Q. And why didn't you say in here that it was all just a big  
12 joke?

13 A. Where are you saying that I'm saying it is a joke?

14 Q. Anywhere in this e-mail.

15 THE COURT: He is asking why in the e-mail you did  
16 not say it was a joke to Edmiston.

17 That's your question, right?

18 MR. DAVIS: It is.

19 THE COURT: Okay.

20 THE WITNESS: I don't recall ever saying that I said  
21 it was a joke.

22 BY MR. DAVIS:

23 Q. Other than testifying under oath in court today, you never  
24 said your e-mail was a joke to Mr. Edmiston to ask him to  
25 record Plaintiffs at the trade show?

1 A. Not in this e-mail.

2 Q. Other e-mails, you said it was a joke?

3 A. For certain, yes.

4 Q. For -- excuse me?

5 A. For certain, another e-mail was a joke, yes.

6 Q. But when your lawyers were asking you to follow up on the  
7 recordings, you didn't say to them, "Hey, this is a big joke.  
8 Why are you asking about this," right?

9 A. Correct.

10 Q. Okay.

11 THE COURT: And I apologize for interrupting,  
12 Mr. Davis. I want to make sure I understand the testimony.

13 Are there other e-mails that you wrote where you said  
14 to Mr. Edmiston or anybody else that the recording was a joke?  
15 I'm having a disconnect. I just want to make sure I get that  
16 clear.

17 THE WITNESS: Your Honor, there is an e-mail before  
18 he goes where I say something to the effect of -- this is  
19 during the lawsuit, mind you, so this would be crazy to  
20 happen -- I said, "Why don't you record them saying something  
21 libelous about me, LOL," laugh out loud.

22 THE COURT: I recall that. I'm clear.

23 I thought there were other e-mails out there where  
24 you say "This is a joke."

25 THE WITNESS: No, I have zero expectation that

1 someone would say something libelous.

2 THE COURT: I was just concerned that there was other  
3 e-mails referring to it as a joke.

4 THE WITNESS: No.

5 THE COURT: Okay. I understand now. I'm clarified.

6 Sorry for interrupting, but if that was the  
7 situation, then there would be another problem.

8 So go ahead.

9 MR. DAVIS: We move 25 into evidence, Plaintiff's  
10 Exhibit 25.

11 MR. SALAM: No objection, your Honor.

12 THE COURT: 25 will be admitted.

13 (Plaintiff's Exhibit 25 was offered and received in  
14 evidence.)

15 BY MR. DAVIS:

16 Q. We know why your attorneys are asking these questions,  
17 right, because we just got some new documents yesterday.

18 I'm going to ask you to take a look at the Leavens  
19 Strand Defendants' Exhibit 18 that was produced, I believe,  
20 yesterday for the first time, HK-18.

21 THE COURT: Okay. Hold on one second. HK No. 18.  
22 Give me a moment.

23 Do you have it in front of you, Mr. Duke?

24 THE WITNESS: I do.

25 THE COURT: Let's take a moment. I have to take a

1 look at it. I haven't seen it before.

2 Go ahead. I'm the one that's almost done flipping  
3 through it. I wanted to read it before you start asking  
4 questions.

5 MR. DAVIS: I understand, your Honor.

6 THE COURT: Go ahead, Mr. Davis.

7 BY MR. DAVIS:

8 Q. Mr. Duke, do you recognize this exhibit?

9 A. Yes.

10 Q. Do you recognize the e-mail that you received on  
11 September 30th, 2014, from your prior attorney Ms. Heather  
12 Liberman?

13 A. Yes, I do.

14 Q. Do you dispute the accuracy of this e-mail in any way that  
15 you sent to her on September 30th, 2014?

16 A. No, I do not.

17 Q. Okay. And what do you say in the contents of your e-mail  
18 sent from your brentduke@yahoo.com account to your prior  
19 attorney Ms. Liberman?

20 What's the first line of your e-mail at 2:37 p.m.?

21 A. "Said recording did not work, so there isn't another  
22 recording."

23 Q. And do you see the follow-up e-mail above? Ms. Liberman  
24 reports in an e-mail to Mr. Leavens, one of your other prior  
25 attorneys. Do you see what she wrote there?

1 A. "See Brent's response below. There is no second  
2 recording."

3 Q. Right.

4 When is the first time that you saw this e-mail?

5 A. The e-mail from me or the e-mail between the lawyers?

6 Q. I'm sorry. The last e-mail that's displayed on LS  
7 Exhibit 18, that's on the screen now. The time of it is  
8 2:38 p.m. on September 30th, 2014.

9 A. Well, I'm not attached on it, so yesterday --

10 Q. Yesterday?

11 A. -- when it was presented.

12 Q. That's the first time you saw it?

13 A. I don't know how I could have seen it any other way.

14 Q. Okay. Now, based on the documents that you and your  
15 company have now produced -- that was on May 31st of 2018,  
16 right? Do you remember that? We got all the native data, and  
17 then you were also required to produce a paper copy of your  
18 Yahoo! e-mail account on June 1st, 2018?

19 Do you recall that?

20 A. I didn't handle that. I know what you are talking about.

21 Q. You know what happened, though, right?

22 A. Yes.

23 Q. Okay. And we know from reviewing that entire production  
24 now that there is a third recording that was never produced or  
25 ever identified in this case, right?

1 A. Now you have lost me.

2 Q. You have got no idea that there is a third recording that  
3 you received in your e-mail account -- or, sorry, that you  
4 were aware of from e-mails from Mr. Edmiston; is that right?

5 A. I had no idea there was a second recording. I really  
6 don't know what you are talking about right now.

7 Q. All right. Let's go to Plaintiff's Exhibit 24.

8 THE COURT: Just so we don't lose track, HK-18, are  
9 you waiting to get that introduced later?

10 MR. SALAM: I have no objections to it.

11 THE COURT: Do you want to admit it?

12 MR. DAVIS: Sure.

13 THE COURT: I just don't want to --

14 MR. DAVIS: We talked about doing something at the  
15 end.

16 THE COURT: Yes, we did.

17 MR. SALAM: I'm fine with doing it as we go. If it  
18 is at the end, we can follow up.

19 THE COURT: We will make sure we got everything  
20 cleaned up at the end, but it was in front of me, and before  
21 he moved to another exhibit, I just wanted to address that.

22 So we have got an e-mail relating to a supposed third  
23 recording.

24 Exhibit 24, do you have that in front of you?

25 (Exhibit HK-18 was offered and received in evidence.)



1 BY MR. DAVIS:

2 Q. Mr. Duke, you have Plaintiff's Exhibit 24 displayed in  
3 front of you?

4 A. Yes.

5 Q. Do you see that?

6 A. Yes.

7 Q. And that's an e-mail string between you and Mr. Edmiston  
8 from October 4th of 2014, right?

9 A. What date?

10 Did you say October 24th?

11 Q. October 4, 2014.

12 A. October 4, yes, yes.

13 Q. All right. And this was produced as part of your June 1,  
14 2018, production, and the paper, for purposes of  
15 identification, is 21C 1013062.

16 Do you see that on the document?

17 A. Yes.

18 Q. Okay. And this is an e-mail string, and it was produced  
19 for the first time in June of 2018.

20 Please review that e-mail, all right?

21 And at the top of it, confirm that Mr. Edmiston is  
22 describing something to you, right?

23 Can you read that, read what he wrote, the first  
24 paragraph?

25 A. "I found a longer one that I cannot forward. Too long,

1 but I have it. So there is a second one. Mostly just general  
2 talking, but he does state they have gone to the FDA and they  
3 have Washington lobbyist. Also states this guy is the one  
4 that goes to the factory and tests the vapping for the units.  
5 Long recording, and we did not get much good info in this one  
6 that much clearer. We are bad spies :):) But this proves  
7 they were there, and maybe his voice can be identified."

8 Q. All right. And when did any of your prior attorneys first  
9 learn of the existence of this longer third recording  
10 referenced in PX-24?

11 A. To the best of my knowledge, he was discussing the  
12 recording that was the second recording. I don't know where  
13 this is -- where a third recording is coming from.

14 Q. All right. But this isn't the same as the second  
15 recording, right?

16 You just listened to it in open court, right?

17 A. He believed that he had not sent a second recording. I  
18 believed that he had not sent a second recording. So my  
19 lawyers never received a second recording.

20 Q. The recording from file 118 that you just listened to in  
21 open court, was there anyone saying they have gone to the FDA  
22 and they have Washington lobbyists?

23 Did you hear that on the tape?

24 A. It might be an inaccurate description of that tape.

25 Q. My question to you, sir, is did you hear those words on

1 the tape that you just listened to in open court?

2 A. I believe he said something about Washington in that tape,  
3 didn't he?

4 You would have to replay the tape for me, and then I  
5 would have to compare it to this.

6 Q. That would be the only way you could do it, right?

7 A. I wasn't memorizing what was being said in the tape, no.

8 Q. Did you hear anything where the guy states that he is the  
9 one that goes to the factory and tests the vaporizing for the  
10 units?

11 A. No.

12 Q. Okay. And this says it is a long recording, right?

13 A. Correct.

14 Q. And this is one that you never obtained from Mr. Edmiston  
15 or produced in this case, right, this third recording?

16 MR. SALAM: Object, your Honor. It --

17 THE COURT: Basis?

18 MR. SALAM: I apologize. I would like to strike my  
19 objection.

20 THE COURT: That's okay. You don't have to  
21 apologize.

22 All right. Show it as withdrawn.

23 Just to keep this clear -- and I understand what you  
24 are saying, Mr. Davis, is you played what was referred to as  
25 the second recording.

1           This document, Exhibit 24, says "So there is a second  
2 one." But we have already talked about the second one, and we  
3 played it. And this e-mail, Exhibit 24, has quotes of  
4 statements made that I didn't hear either.

5           So you are sort of referring to it as a third, and so  
6 I understand where you are going.

7           I just want to make that clear because we are all  
8 sitting here right now, and if someone is reading a cold  
9 record, they are going to say, "What's he talking about, a  
10 third recording," which I think is your point, is where is  
11 this third recording.

12           MR. DAVIS: That's exactly my point.

13           THE COURT: Okay.

14           MR. DAVIS: And if we would have had these not dumped  
15 on us in June of 2018, we might have been able to understand  
16 this much more clearly and taken depositions timely and done  
17 other things in this case. I'm sorry for the frustration in  
18 some of my questions.

19           THE COURT: I'm not frustrated. I just want the  
20 record clear --

21           MR. DAVIS: Thank you.

22           THE COURT: -- to what's in my head. So if this goes  
23 up, and someone is reading a cold record, I could see that  
24 person being confused as to references to second recordings  
25 and third recordings.

1           So I understand what you are saying about third  
2   recording, and I can understand sort of what Mr. Salam is  
3   saying, is, "Okay, where is the third recording," but that's  
4   your whole point, is where is the third recording.

5           MR. DAVIS: That's exactly my point.

6           THE COURT: Okay.

7           MR. DAVIS: We move Plaintiff's Exhibit 24 into  
8   evidence.

9           MR. SALAM: No objection, your Honor.

10          THE COURT: Okay. 24 will be admitted.

11         (Plaintiff's Exhibit 24 was offered and received in  
12         evidence.)

13         BY MR. DAVIS:

14         Q. I would like to turn your attention to Plaintiff's  
15         Exhibit 26 now. It's being shown to you.

16                 This is an October 4, 2014, e-mail string between you  
17         and Mr. Edmiston. It is from Defendants' June 1, 2018,  
18         production. It is Bates 21C 1013068.

19                 Do you see that in front of you, Mr. Duke?

20         A. Yes, I do.

21         Q. Do you dispute the accuracy in any way of your e-mail with  
22         Mr. Edmiston on or about that date?

23         A. No, I do not.

24         Q. Okay. And what does Mr. Edmiston say to you?

25                 Right in the middle, he is writing to you.

1           There is -- the first e-mail at the bottom is blank,  
2   right, the one at 9:15 a.m.?

3   A.   Correct.

4   Q.   Right.

5           And going in reverse order, from the bottom up, the  
6   next one is at 9:22 a.m., right?

7   A.   Correct.

8   Q.   That's your e-mail to him?

9   A.   Correct.

10   Q.   And what did you say to him?

11   A.   "I think they have that one, but will send again just to  
12   be sure.  Sucks that it cuts off right there.  LOL.  How are  
13   things looking for tomorrow?  Heading to Chavez Ravine in  
14   about five hours (go Dodgers).  Thanks!"

15   Q.   And then Mr. Edmiston writes back to you.

16           Again, this is all in your Yahoo! e-mail account,  
17   right?

18   A.   Yes.

19   Q.   I'm sorry.  That was yes?

20   A.   Yes.

21   Q.   And that was at 9:44 a.m. on October 4th, 2014?

22   A.   Yes.

23   Q.   And what does Mr. Edmiston say to you?

24   A.   "You can hear this recording tomorrow.  Any idea how to  
25   get it forwarded when too long?"

1 Q. Okay. And you write back later that day at 10:27 a.m.?

2 A. "I'm honestly not sure. You could call lawyers directly  
3 and play it for them, see if it is worth the trouble of  
4 figuring out."

5 Q. All right. And did you meet with Mr. Edmiston?

6 A. I have met with him before.

7 Q. Before October 4th, 2014, at 10:27 a.m.?

8 A. I can't tell you the exact dates that I met with him, but  
9 I met with him on multiple occasions.

10 Q. Directing your attention to Plaintiff's Exhibit 26, you're  
11 exchanging communications with Mr. Edmiston, right?

12 A. Yes, I am.

13 Q. And you just read an e-mail from him to you that says:  
14 "You can hear this recording tomorrow."

15 Am I reading that correctly in the e-mail?

16 A. Yes, that's what it says.

17 Q. So you were meeting with him the next day, right?

18 A. That is incorrect.

19 Q. Okay. My question is: Did you meet with Mr. Edmiston as  
20 a follow-up to this e-mail?

21 A. I don't believe so.

22 Q. And why would you have not met with him?

23 A. Because we have never lived anywhere near each other.

24 Q. Why is he saying "You can hear it tomorrow," then, in his  
25 e-mail?

1 A. Because we have telephones.

2 Q. Is he saying to you that he was going to play it for you  
3 in a phone conference that you had scheduled for the next day?

4 A. I don't know that you need a phone conference. You can  
5 call someone and play something for them.

6 Q. And that's what happened on the next day, you had a phone  
7 call with him?

8 A. As I stated previously, I have never heard that recording.  
9 So, no, I didn't hear it in 2014 if I had never heard it. We  
10 didn't talk the next day. He never played this for me.

11 Q. Got it.

12 And did you ever tell your prior attorneys about this  
13 additional long recording that Mr. Edmiston had and was  
14 referenced in Plaintiff's Exhibit 26?

15 A. I don't believe it's an additional long recording. I  
16 believe it is the one we just saw -- or heard or whatever.

17 Q. Okay. My question is, and let me say it again, based on  
18 Plaintiff's Exhibit 26, did you ever tell any of your prior  
19 attorneys about this longer recording that he couldn't forward  
20 to you because it was too long?

21 Do you recall that?

22 A. Yes, we had discussions that there was a second recording  
23 that we were having trouble figuring out how he was going to  
24 forward it. That was a known issue, yes.

25 Q. Right.



1           And in Plaintiff's Exhibit 26, he's talking about a  
2   longer recording that he can't forward to you, right?

3   A.   I feel like issues are being conflated here.   There  
4   is -- I do not believe that there is a third recording.   You  
5   are conflating incorrect details in what he wrote and then  
6   some imaginary third recording.   I don't think that there is a  
7   third recording.   I didn't think there was a second recording,  
8   so what do I know, but I don't think that there is a third  
9   recording.

10   Q.   All right.   So let me go back to my questions.   I didn't  
11   ask you what you were thinking about these things.   I was  
12   asking for your truthful answers about what you recall, okay?

13           So he is e-mailing you saying, right, "How do I send  
14   this longer e-mail to you," right?

15   A.   Yes.

16   Q.   All right.

17           THE COURT:   Can I pause you right there?

18           Hold on one second.

19           (Brief pause.)

20           THE COURT:   Okay.   Go ahead.

21   BY MR. DAVIS:

22   Q.   Do you understand my question?

23   A.   Can you repeat it?

24   Q.   Yes.

25           Mr. Edmiston says to you at 9:44 a.m. -- you read

1 this -- "Any idea how to get it forwarded when too long?"

2 Do you recall that?

3 A. I'm reading it. I don't have any reason to think it is  
4 not true. I don't necessarily recall it. But, yes, I know we  
5 were having issues forwarding the second e-mail. I do know  
6 that, yes.

7 Q. Right.

8 And you already have, and we now know from your  
9 Yahoo! e-mail account, you already have the first recording,  
10 which is the IMG 117 file, right?

11 A. Yes.

12 Q. And we now know from the e-mail that we just went over and  
13 listened to the file in open court, in your inbox, also, was  
14 the IMG 118 file, right?

15 A. Yes, that's correct.

16 Q. And after that e-mail, Mr. Edmiston is e-mailing you about  
17 a longer one that he can't forward to you because it's too  
18 long; isn't that correct?

19 A. Yes, that's what he is writing, yes.

20 Q. Okay. And my question is: Did you ever tell your prior  
21 attorneys about this recording that he said he couldn't  
22 forward to you because it was too long?

23 MR. SALAM: Objection, your Honor, asked and  
24 answered.

25 THE COURT: Go ahead.

1           That specific question has been danced around, but  
2   not specifically answered. So I will read it.

3           I will overrule the objection.

4           "And my question is: Did you ever tell your prior  
5   attorneys about this recording that he said he couldn't  
6   forward to you because it was too long?"

7           You have kind of answered that before, but go ahead.

8           THE WITNESS: Yes, I feel like I have answered it,  
9   your Honor.

10          Yes, there was a second recording that was too long  
11   to send, that it turns out I did have, yes.

12          THE COURT: Okay.

13          THE WITNESS: I did tell my lawyers "I can't send it.  
14   It's not there."

15          I'm so confused as to what you are asking.

16          THE COURT: Okay.

17          THE WITNESS: I hope that answers it, but I'm  
18   confused.

19          MR. DAVIS: All right. We move Plaintiff's  
20   Exhibit 26 into evidence.

21          MR. SALAM: No objection, your Honor.

22          THE COURT: It will be admitted. 26 is admitted.  
23   (Plaintiff's Exhibit 26 was offered and received in  
24   evidence.)  
25

1 BY MR. DAVIS:

2 Q. I want to turn your attention now to Plaintiff's  
3 Exhibit 27. This is a January 26, 2015, e-mail from  
4 Mr. Edmiston to you.

5 I ask you to take a look at Plaintiff's Exhibit 27,  
6 on the screen, and tell me if you recognize it.

7 Take your time and read the whole e-mail.

8 Thank you.

9 (Brief pause.)

10 A. Okay.

11 THE COURT: Hold on one second. Let me finish  
12 reading it. You read much faster than I do.

13 (Brief pause.)

14 THE COURT: Okay. Go ahead.

15 BY MR. DAVIS:

16 Q. And this is the second page of the exhibit, if you want to  
17 take a look at that, Mr. Duke.

18 All right. And you recognize this e-mail?

19 A. I don't want to say I recognize it, but it looks correct.

20 Q. Do you dispute --

21 A. I don't dispute the accuracy of it. It's fine.

22 Q. Thank you.

23 That's an e-mail you received to one of your GoDaddy  
24 e-mail accounts, your bduke one, right, on or about  
25 January 26, 2015, right?

1 A. Correct.

2 Q. All right. And you see at the top there it has got the  
3 business card .pdf?

4 A. Yes.

5 Q. All right. And there is another untitled attachment,  
6 right?

7 A. Yes.

8 Q. And there are no files attached to this, right?

9 A. Correct.

10 Q. And this e-mail is referencing questions --

11 A. Right.

12 Can I --

13 THE COURT: Go to the next page.

14 THE WITNESS: There are files attached because there  
15 is a business card. So, I'm sorry, there is something  
16 attached, obviously.

17 MR. DAVIS: Sorry.

18 THE WITNESS: My apologies.

19 BY MR. DAVIS:

20 Q. Let me clarify my question.

21 As it shows on the first page of this exhibit, there  
22 is a business card .pdf and an untitled attachment 152758.txt  
23 file, right?

24 A. Yes, and I believe I just said there are no attachments,  
25 but there are, obviously, two attachments.

1 Q. Right.

2 And to keep it really clear, my question was there  
3 were no other attachments than the two that are displayed  
4 there?

5 A. Okay. My apologies. Correct.

6 Q. Thank you.

7 And this is -- does this reflect that your prior  
8 attorney Travis Life is calling Mr. Edmiston and asking  
9 questions about the trade show?

10 Is that right?

11 A. Hypothetically. I am not involved. I was not involved in  
12 that discussion. I'm not sure what they talked about.

13 Q. I'm not asking if you were involved in the discussions.  
14 I'm asking you if this is what it says in the e-mail to you.

15 A. I don't know where you are seeing that they are talking  
16 about the trade show.

17 Q. All right. Go to the first line.

18 It is addressed to you, right, Brent?

19 A. Correct.

20 Q. And the second line says: "I talked to your  
21 attorney-Travis-".

22 Do you understand that?

23 A. I do.

24 Q. And that means what?

25 A. Travis Life.

1 Q. That means Mr. Edmiston talked to your prior attorney  
2 Travis Life?

3 A. I don't dispute that they spoke, but you are adding in  
4 what their conversation was, and I don't know how I could know  
5 that.

6 Q. Well, let's look at the next line. What does that say?

7 A. "He was calling for the same questions as prior. Feel you  
8 are overpaying these guys."

9 Q. Okay. And the next line?

10 A. "He wanted the info on the guy I talked to-who was it?  
11 Was it more than one on the tape??"

12 Q. All right. Does that refresh your recollection as to  
13 whether your prior attorney is calling Edmiston, asking him  
14 questions about the trade show?

15 A. Again, I can hypothesize by reading this, but I  
16 didn't -- I don't understand how you want me to say what they  
17 were talking about. I could guess that this looks like they  
18 are talking about the tape from the trade show, but what if it  
19 is not? My guess would be it's about the tape from the trade  
20 show. That be would a good guess.

21 THE COURT: A fair inference, right?

22 THE WITNESS: Yes.

23 THE COURT: Okay.

24 MR. DAVIS: Okay.

25

1 BY MR. DAVIS:

2 Q. And Mr. Life is contacting Mr. Edmiston about the trade  
3 show, asking him questions. Do you know if by "the tape" he  
4 is talking about the recordings that we just reviewed?

5 MR. SALAM: Object, your Honor, asked and answered.  
6 The witness -- well, objection, asked and answered.

7 THE COURT: Overruled.

8 THE WITNESS: I believe I just said, yes, my guess is  
9 that that would be the tape from the trade show.

10 BY MR. DAVIS:

11 Q. And your attorneys are calling, asking him for  
12 information, but did they also call you and ask you to find  
13 these recordings in your e-mails?

14 A. Yes, I believe we just have discussed that. Yes, they  
15 definitely asked me.

16 MR. DAVIS: We move Plaintiff's Exhibit 27 into  
17 evidence.

18 MR. SALAM: No objection, your Honor.

19 THE COURT: 27 will be admitted.

20 (Plaintiff's Exhibit 27 was offered and received in  
21 evidence.)

22 BY MR. DAVIS:

23 Q. All right. Now, I want to focus your attention on your  
24 company's sales data in this case, right?

25 The data about how much product you sold, when you



1 sold it, where you sold it, all that sales data comes from  
2 you, right?

3 A. Correct.

4 Q. Okay. And it's not information your attorneys have unless  
5 you give it to them, right?

6 A. Correct.

7 Q. And during the course of this case, in your initial  
8 discovery, before 2018, you produced a spreadsheet that had  
9 your company's sales data as of a certain date, right?

10 A. Lots of spreadsheets with sales, correct.

11 Q. When you say "lots of them," particularly, you produced  
12 one spreadsheet summarizing all of your company's sales  
13 through a certain date; isn't that right?

14 Do you recall doing that?

15 MR. SALAM: Objection, your Honor, foundation. I  
16 don't know what time period or what date he is talking about.

17 THE COURT: All right. Do you have the document?

18 MR. DAVIS: I do.

19 Let's take a look at Plaintiff's Exhibit 31.

20 THE COURT: Sustained. We will take a look at the  
21 document.

22 31, right?

23 MR. DAVIS: Plaintiff's Exhibit 31 was produced by  
24 Defendants during discovery, and it is Bates-stamped by  
25 Defendants as 21C-0431 through 0454.

1 BY MR. DAVIS:

2 Q. Mr. Duke, I ask you to take a look at what's displayed in  
3 front of you. And it's multiple pages. If you need my  
4 colleague to flip through more pages of it, just say what you  
5 need to take a look at.

6 A. No, I know what this is.

7 Q. You are fully familiar with this document?

8 A. Yes.

9 Q. And it's from Pages 431 at the bottom, you can see that,  
10 and it goes all the way to 454, right?

11 A. Correct.

12 Q. Okay. And this is the sales data you produced in this  
13 case, right?

14 A. I produced a lot of sales data for this case.

15 Q. But this is the summary, the spreadsheet summary, you  
16 produced through a certain point of time, January of 2013, I  
17 think, right?

18 Isn't that correct?

19 A. Yes, I did produce this, yes.

20 Q. Okay. And this is the summary that you and your prior  
21 attorneys gave to your expert, right, the damages expert in  
22 this case?

23 You know that, right?

24 A. I believe we probably gave him much more than just this  
25 one spreadsheet.

1 Q. But you gave him this one, right?

2 A. I don't know what they gave to my damages expert.

3 Q. And how would you know what you gave him?

4 How do you know what your prior attorneys gave him?

5 Would you look at his report to see?

6 A. I would have to look at my prior attorneys' e-mails to the  
7 damages expert to know what they gave him.

8 Q. Right.

9 And you could also look at his report, too, and see  
10 that, right?

11 Doesn't he reference in his report all the documents  
12 he got from you and your company to base his damages  
13 calculation on? Isn't that right?

14 THE COURT: Have you read your expert's report?

15 THE WITNESS: Not recently, your Honor. I would have  
16 to see where that was listed in that report to answer that  
17 question.

18 BY MR. DAVIS:

19 Q. All right. But focusing on Plaintiff's Exhibit 31 -- you  
20 have read our motion for sanctions against you and your  
21 company in this case, right?

22 A. Yes.

23 Q. You reviewed it with your prior attorneys?

24 A. Yes.

25 Q. And you reviewed it with your new attorneys?

1 A. Yes.

2 Q. So you know the allegation about this report, right?

3 A. Yes.

4 Q. Okay. So let's take a look at Plaintiff's Exhibit 32.

5 All right. This is a February 10th, 2013, e-mail,  
6 right --

7 A. Yes.

8 Q. -- from support@21centurysmoking.com.

9 That's your e-mail account, right?

10 A. In this case, my wife sent it to me, but, yes, it is a  
11 company e-mail account.

12 Q. How do you know from looking at this your wife sent it to  
13 you?

14 A. Because she is the one that does these sales figures.

15 Q. All right. But you have full access to and use your  
16 support@21centurysmoking.com e-mail account?

17 A. Yes.

18 Q. And that was sent to you at your brentduke@yahoo.com  
19 account?

20 A. Yes.

21 Q. All right. And this e-mail and the attachment we only  
22 have after you finally searched for the first time your Yahoo!  
23 e-mail account on or about June 1, 2018, when those documents  
24 were produced. You understand that?

25 MR. SALAM: Objection, your Honor, to the form of the

1 question.

2 THE COURT: Yes. Hold on one second here.

3 I will sustain. Why don't you break that into two or  
4 three questions.

5 MR. DAVIS: Sure.

6 BY MR. DAVIS:

7 Q. You have already confirmed that you read our motion for  
8 sanctions, right?

9 A. Yes.

10 Q. You read it with your prior attorneys?

11 A. Yes.

12 Q. And you read it with the new attorneys?

13 A. Correct.

14 Q. And you know the allegation about this report, right?

15 A. Yes.

16 Q. That when you first produced it, it was missing two pages,  
17 right?

18 A. That's the allegation, yes.

19 Q. You understand it?

20 A. Yes.

21 Q. You are aware of it?

22 A. Absolutely.

23 Q. Okay. Now, the allegation, right, is that Plaintiff's  
24 Exhibit 32, we received -- Plaintiffs -- for the first time  
25 after you produced your Yahoo! e-mail account on June 1, 2018?

1                   You understand that, right?

2    A.   I do understand that, yes.

3    Q.   Okay.   And this Plaintiff's Exhibit 32 is the complete  
4    report; is that not correct?

5    A.   That is incorrect.

6    Q.   This e-mail you received from your wife to you on  
7    February 10th, 2013, attaches a monthly sales.doc document;  
8    does it not?

9    A.   It does, yes.   This is the work product we were working  
10   on, correct.

11   Q.   And that's the attachment, right?

12   A.   Yes.

13   Q.   And attached to it, in the pages that follow in this  
14   document -- we are going to review them -- is the entire  
15   monthly sales.doc document referenced in that e-mail, right?

16   A.   Yes.

17   Q.   Okay.   And so the first page is an e-mail from support to  
18   your Brent Duke Yahoo! account, right?

19   A.   Correct.

20   Q.   And let's look at the first page of PX-32.

21                   And you don't dispute the authenticity of this e-mail  
22   in any way, right?

23   A.   No, it is a real e-mail.

24   Q.   And it is a real attachment?

25   A.   Yes, a real attachment.

1 Q. And you don't dispute any of the contents of the  
2 attachment that are being displayed here to you?

3 MR. SALAM: Your Honor, I'm sorry, no objection at  
4 this time.

5 THE COURT: Go ahead and answer.

6 THE WITNESS: I don't know what you mean by "dispute  
7 the contents."

8 BY MR. DAVIS:

9 Q. All right. Well, I'm going to ask you to take a moment  
10 and look at PX-32.

11 And for the record, it is identified by Bates number  
12 21C 1005533 to 5558.

13 And you looked at this before today to prepare,  
14 right, for your testimony?

15 A. Of course, yes.

16 Q. You flipped through all the pages?

17 A. Yes, I have no dispute about the pages following those  
18 first two pages. But, yes, but I flipped through all the  
19 pages.

20 Q. And that's what I want to be clear about, right, you don't  
21 dispute the accuracy of any of these pages that follow from  
22 the e-mail on the first page, right?

23 MR. SALAM: Your Honor, object to the form of the  
24 question. I'm having trouble understanding. Is he asking  
25 does he dispute the accuracies of the numbers contained

1     therein or just what's on the page?

2                 I mean, does that make sense, or I'm confusing the  
3     issue?

4                 THE WITNESS: I'm having that same issue.

5                 THE COURT: Well, I assume you didn't put false sales  
6     data in the document, but all right.

7                 THE WITNESS: This isn't a document that was given to  
8     the IRS. This is not a document that was --

9                 THE COURT: I don't know, when I had a business, I  
10    made sure my financials were pretty accurate.

11                THE WITNESS: All of the pages are accurate, other  
12    than the first two.

13                THE COURT: Other than the first two?

14                THE WITNESS: Yes, that they are disputing and  
15    discussing.

16                THE COURT: Okay. All right.

17                THE WITNESS: Or the first one. The first one. I  
18    guess, the first one page.

19                THE COURT: The first one showing the sales document.  
20    It says "Online Sales," "2009 Sales" at the top.

21                THE WITNESS: Yes, the "Online Sales" one is not.  
22    These are not accurate numbers. But it's -- there is numbers  
23    on the page, that's accurate, but these numbers are not actual  
24    accurate sales figures.

25                THE COURT: Okay. Does that answer your question?



1           MR. DAVIS: It does, and it leads me to another  
2 question.

3           THE COURT: Another question.

4 BY MR. DAVIS:

5 Q. So when you received this e-mail on May 31st -- strike  
6 that.

7           What's the first page of this again?

8           On February 10th, 2013, right, it attached the entire  
9 monthly sales.doc report, right?

10 A. It attached the monthly sales report, including online,  
11 which is a slightly different document.

12 Q. But the first page of the e-mail only recites or  
13 references one attachment, right?

14 A. Correct.

15 Q. And if we go to the second page, 5534, at the top, you can  
16 see it says "monthly sales.doc," right?

17           At the top?

18 A. Correct.

19 Q. So this is the first page of that attachment, right, that  
20 document that was attached to the e-mail?

21 A. I'm not disputing that this is a real document. I  
22 don't -- so that's where I'm unclear on your question. This  
23 is definitely a real document, yes.

24 Q. Okay. And this page is part of that monthly sales.doc  
25 document, right?

1 A. Absolutely, yes.

2 Q. Okay. And we only have this e-mail and the attachment  
3 because it was produced for the first time in your June 1,  
4 2018, production; isn't that right?

5 A. Yes. I don't generally hand out partial work products to  
6 people, so yes. I'm not sure why anyone would ever have had a  
7 partial work product from me. My lawyers wouldn't have gotten  
8 a partial work product, nor would you have gotten a partial  
9 work product. So, no, no one else would have gotten this  
10 product, other than my wife sending it to me.

11 MR. DAVIS: Can you read back my question to the  
12 witness, please?

13 THE COURT: "And we only have this e-mail and  
14 attachment because it was produced for the first time in your  
15 June 1, 2018, production; isn't that right?"

16 THE WITNESS: Yes, correct.

17 BY MR. DAVIS:

18 Q. And let's go to the first page of the exhibit because now  
19 your answer makes me wonder something else.

20 Where on this first page of the e-mail does your wife  
21 write to you and say anything about this being a partial  
22 document or incomplete in some way?

23 A. It was the online -- it was the part of online sales that  
24 she tracked. So that's the incomplete. She doesn't need to  
25 explain it to me.

1 Q. And that doesn't say that on this e-mail, right?

2 A. It would go without saying. I know. It's my wife. I  
3 know what she is sending me.

4 Q. Okay. And --

5 THE COURT: Okay.

6 (Brief pause.)

7 THE COURT: Oh, were you waiting for me, and I was  
8 waiting for you?

9 MR. DAVIS: Yes.

10 THE COURT: Go ahead.

11 BY MR. DAVIS:

12 Q. I'm going to ask you to look back at Plaintiff's  
13 Exhibit 31, and this is the document that was attached to your  
14 expert report, your market penetration expert, Mr. David Haas.

15 Do you understand that?

16 A. I have no reason to dispute that. This is an accurate  
17 document, yes.

18 Q. Okay. And you and your prior attorneys provided your  
19 sales data to your market penetration expert, Mr. Haas, right?

20 A. Yes.

21 Q. All right. Did you participate in the meetings or  
22 decisions about what documents to give your expert, Mr. Haas?

23 A. I don't recall. I provided them with accurate sales  
24 figures; I know that.

25 Q. Okay. But you never provided them the first page of PX-2

1 as part of the sales data you provided to your expert; isn't  
2 that right?

3 You know the allegation in the motion, right?

4 THE COURT: 32.

5 MR. DAVIS: Thank you, your Honor.

6 THE WITNESS: Because that's not accurate data. Why  
7 would I provide my expert with inaccurate data?

8 BY MR. DAVIS:

9 Q. And I'm asking you -- strike that response.

10 I'm not asking you for --

11 THE COURT: Hold on. I get to strike responses.

12 MR. DAVIS: I'm asking you --

13 THE COURT: Hold on. Let's back this up.

14 Go ahead and ask a question.

15 BY MR. DAVIS:

16 Q. I'm asking you not about your thinking about it, but I'm  
17 asking you to confirm that the first page of Plaintiff's  
18 Exhibit 32 was not given to your expert, Mr. Haas, as part of  
19 his analysis in this case, right?

20 A. Correct. Yes. Correct.

21 Q. And it was also never produced in this litigation to  
22 Plaintiffs, right?

23 A. Correct.

24 Q. Okay. And my question is was it your decision alone to  
25 not provide the e-mail in the first page of this report to

1 your expert?

2 MR. SALAM: Which?

3 MR. DAVIS: PX-32.

4 THE WITNESS: Well, yes. Yes, absolutely.

5 BY MR. DAVIS:

6 Q. Okay. And --

7 THE COURT: Which says "Online Sales" at the top,  
8 upper left-hand corner, right?

9 MR. DAVIS: Yes, that's 21C 1005534. It's the second  
10 page of PX --

11 THE COURT: That's a better way of describing it.

12 MR. DAVIS: -- 32.

13 BY MR. DAVIS:

14 Q. That one, it was your decision alone, right?

15 A. I believe so, yes.

16 Q. Okay. And Plaintiff's Exhibit 32 is dated January of  
17 2013, right?

18 A. February of 2013, right?

19 Q. I'm sorry. I think I'm looking at --

20 THE COURT: Correct.

21 BY MR. DAVIS:

22 Q. Let's go to the first page of PX-32. What's the date of  
23 that?

24 A. Sunday, the 10th of February, 2013.

25 Q. Thank you. February 2013.

1           And that's several years before the deposition of

2   your expert, Mr. Haas, took place, right?

3   A.   I don't recall when that deposition took place.

4   Q.   Well, it was in 2016.  That's when the experts were  
5   deposed.  And that's several years before this e-mail was  
6   generated -- I'm sorry.  It was several years after this  
7   e-mail was generated in 2013, right?

8   A.   Okay.  Yes.

9   Q.   Right.

10           And now that we know we have PX-32 from the search of  
11   your Yahoo! e-mail account, we know that if the ESI search  
12   terms were applied to your e-mail account at the proper time,  
13   we would have had this e-mail and report that's PX-32 prior to  
14   the deposition of your expert, right?

15   A.   Correct.

16   Q.   Okay.  Did you ever give the whole report, meaning this  
17   e-mail and the first page of it -- or part of PX-32, which is  
18   21C 1005533 and 34, did you ever give those pages to any of  
19   your prior lawyers at any time before June 1, 2018?

20   A.   I do not recall.

21   Q.   And would it be a matter of reviewing your e-mails for you  
22   to refresh your recollection about that?

23   A.   Yes, that's the only way I would know if I sent it to  
24   them, yes.

25   Q.   That would be the only way?

1 A. Yes.

2 Q. You checked your Yahoo! and your GoDaddy e-mail accounts,  
3 right?

4 A. Yes.

5 Q. Have you done that?

6 A. No.

7 Q. Okay. Now, I want to draw your attention to something we  
8 talked about at your deposition in June of 2015.

9 THE COURT: Are you changing subject matters?

10 MR. DAVIS: I am, your Honor.

11 THE COURT: Let's take a break.

12 Okay. You are still under oath. Don't talk to  
13 anybody about your testimony.

14 THE WITNESS: Okay, your Honor.

15 (Recess taken.)

16 THE COURT: Before you start, I need to look at a  
17 document.

18 (Brief pause.)

19 THE COURT: Okay. Whenever you are ready.

20 MR. DAVIS: Thank you, your Honor.

21 We move Plaintiff's Exhibits 31 and 32 and 71 into  
22 evidence.

23 THE COURT: Any objection?

24 MR. SALAM: No objection, your Honor.

25 THE COURT: All right. 31, 32 --

1 MR. DAVIS: 71 was the recording.

2 THE COURT: Ah. That's why we go through this  
3 exercise. I didn't even write it down.

4 Oh, I do. I thought we already had 71 admitted, but,  
5 okay, it is admitted twice now. We're good.

6 MR. DAVIS: Thank you, your Honor. I wasn't sure.

7 THE COURT: That's okay.

8 (Plaintiff's Exhibits 31 and 32 were offered and received in  
9 evidence.)

10 THE COURT: All right. Go ahead, Mr. Davis.

11 BY MR. DAVIS:

12 Q. Mr. Duke, do you remember at your deposition in 2015, I  
13 asked you about whether you had ever created or owned  
14 websites?

15 Do you remember that?

16 A. Yes.

17 Q. And do you remember how many websites you told me you had  
18 created and owned at that time?

19 A. I don't recall the number, no.

20 Q. All right. Well, we learned from reviewing the documents  
21 you produced for the first time on June 1, 2018, that you  
22 owned many, many, many websites, right?

23 A. Yes.

24 Q. Okay. And at your deposition, in 2015, when I asked you  
25 about it, you disclosed two websites to me, right?



1 A. Yes.

2 Q. Okay. And you testified that the first website you  
3 created, the first one, was brentduke.com, right?

4 A. That sounds correct, yes.

5 Q. Yes.

6 And you said the next one you created was  
7 21centurysmoking.com, right?

8 A. I would have to -- I think that is what I said, yes. I  
9 would have to see the part of the transcript, if possible.

10 Q. Sure.

11 We have in front of you Plaintiff's Exhibit 19, which  
12 is a portion of your testimony from your June 16, 2015,  
13 deposition. I'm going to ask you to review Pages 54 and 55  
14 and tell me if that refreshes your recollection about the  
15 first and next websites you created that I asked you about at  
16 that time.

17 A. Can you go down one page?

18 Q. You are seeing now Page 55 --

19 A. Okay, yes.

20 Q. -- of Exhibit 19?

21 A. Yes.

22 So, yes, I agree with you, yes.

23 Q. You agree, right?

24 A. Yes.

25 Q. Okay. So you testified the first one was brentduke.com

1 and the next one was 21centurysmoking.com, right?

2 A. Correct.

3 Q. Right.

4 And we now know from your Yahoo! e-mail production in  
5 June of 2018 that you created and owned multiple websites  
6 during that time period, right?

7 You just said yes, right?

8 A. I don't believe that I said yes to that time period. I  
9 believe I said, yes, I own multiple websites, right.

10 Q. All right. Well, I'm specifically asking you between the  
11 time period when you created your first one --

12 A. Correct.

13 Q. -- brentduke.com, right?

14 A. Yes.

15 Q. And your next one that you testified and confirmed that  
16 was accurate was 21centurysmoking.com, right?

17 A. Correct.

18 Q. All right. And I'm saying to you we learned from your  
19 June 1, 2018, production that you actually owned many other  
20 websites that were created during that time period, right?

21 A. All during about this same exact time period, there were a  
22 bunch of websites, yes, correct.

23 Q. Okay. But you didn't tell us about them at your  
24 deposition in 2015, right?

25 A. Correct, yes.

1 Q. Okay. How many URLs or domain names for websites do you  
2 own?

3 A. Approximately, 50 domains.

4 Q. Okay. And how many did you buy after you set up  
5 brentduke.com, but before you set up 21centurysmoking.com?

6 Do you know?

7 A. I do not know.

8 Q. Okay. And of the websites that you said you own  
9 currently, how many are live on the Internet right now?

10 A. I do not know.

11 Q. Okay. Well, we looked at your June 1, 2018, production,  
12 right, and we found all kinds of GoDaddy invoices and billing  
13 information, with all of your domains listed, okay?

14 Do you understand that?

15 A. Yes.

16 MR. SALAM: Objection, your Honor.

17 BY MR. DAVIS:

18 Q. And you know that was in the production --

19 THE COURT: I will say it again: Question,  
20 objection, ruling, answer.

21 So the answer before any of that happened, you are  
22 learning things in the production. You can ask him "Did you  
23 produce? Are you aware that we have it?"

24 Okay. So you can just kind of take out that  
25 assumption in the questions going forward, okay?

1 MR. DAVIS: Thank you.

2 THE COURT: So overruled at this point.

3 BY MR. DAVIS:

4 Q. Are you aware that in your June 1, 2018, production that  
5 there were GoDaddy invoices and billing information about the  
6 domains and URLs that you owned?

7 A. There should be, yes.

8 Q. Okay. Do you own a website and a domain called  
9 "inhaleinside.com"?

10 A. Yes.

11 Q. Okay. And do you own one called "getrichsmoking.com"?

12 A. Yes.

13 Q. Do you own one called "nicotinedream.com"?

14 A. I believe so, yes.

15 Q. Okay. And do you have a recollection of when you  
16 purchased all of those domain names?

17 MR. SALAM: Objection, your Honor. My objection is  
18 on relevance. I'm trying to understand -- if we are just  
19 going to impeach -- if they are just going to seek to impeach  
20 Mr. Duke on documents they have, which obviously aren't lost,  
21 okay, that is not relevant to the sanctions motion.

22 So that is my general relevance objection. That's my  
23 concern. I will leave it to the court to decide what is or  
24 isn't relevant, but I just wanted to put that on the record.

25 THE COURT: And that's fine. I understand where you

1 are coming from. I will get a response from Mr. Davis. I  
2 think I know what he is doing, although in my head, there is a  
3 difference between creating and owning a website.

4 So what's the response to the general relevance  
5 objection?

6 MR. DAVIS: The relevance is that in 2015, I asked  
7 Mr. Duke specifically about websites, the first one and the  
8 next one, and the ones I have just listed were all created and  
9 purchased by him between brentduke.com and  
10 21centurysmoking.com.

11 THE COURT: And the purpose of --

12 MR. DAVIS: Because the contents of those websites  
13 contains data and information relevant to the core issues in  
14 this case, particularly about whether Mr. Duke has the skill  
15 and ability to put my client's trademark in the metadata of  
16 his website, and I'm going to go into that next.

17 THE COURT: Based upon that, overruled. That's where  
18 I assumed he was going.

19 MR. SALAM: And, your Honor, I just -- I respect your  
20 ruling.

21 THE COURT: Oh, thanks.

22 MR. SALAM: My concern is I still don't see how that  
23 is relevant to the issues in the sanctions motion, as  
24 to -- when I say "sanctions," I know they have raised it. I'm  
25 trying to understand what the relevance is to Rule 37

1 sanctions, the issues in Rule 37 about whether or not there  
2 has been any ESI lost and not otherwise recovered.

3 THE COURT: Well, remember that their motion was much  
4 more than just Rule 37(e).

5 So overruled.

6 MR. SALAM: Thank you, your Honor.

7 BY MR. DAVIS:

8 Q. My question is do you have a recollection of when you  
9 purchased the domain names that I just read off to you?

10 And I can read them again to you, if you would like.

11 A. It would have been all about the same time frame as  
12 21centurysmoking.com. There was a bunch of domains I  
13 purchased within a couple of months of each other.

14 Q. Well, according to your own records, is it accurate that  
15 you purchased 21centurysmoking.com on or about January 13th of  
16 2009?

17 A. Sometime in January of 2009, that sounds right.

18 Q. And inhaleinside.com was purchased, if you recall -- do  
19 you recall a date?

20 A. If I had to guess, I would say November of 2008.

21 Q. Okay.

22 A. December of 2008, somewhere in that range.

23 Q. And your records reflect November 12th, 2008?

24 A. It sounds accurate.

25 Q. It sounds accurate. Okay.

1                   And that was on the same day that you purchased  
2   getrichsmoking?

3                   Do you recall?

4   A.   I don't recall. That sounds about accurate. I don't  
5   recall the exact dates of any of these.

6   Q.   Is that the same day you purchased nicotinedream.com?

7   A.   It's possible.

8   Q.   Okay. And your GoDaddy domain name records that you  
9   produced on June 1, 2018, would be the best evidence of when  
10   you purchased those domains?

11   A.   Or, yes, I can look in my account and see, but yes.

12   Q.   Yes.

13                  You can just go online and access your GoDaddy  
14   account, right?

15   A.   Yes.

16   Q.   And it lists all your domains you own?

17   A.   Yes.

18   Q.   And it tells you when you bought them?

19   A.   Correct.

20   Q.   Yes.

21                  And I don't recall, but I asked how many of those  
22   websites are live on the Internet now.

23   A.   I am entirely unsure.

24   Q.   Okay. And for each domain name, you set up a website,  
25   right?

1 A. No.

2 Q. And what's -- is there any part of that question you don't  
3 understand?

4 A. You said for each domain name, I set up a website, and  
5 that's false.

6 Q. Okay. For any of those domain names, did you set up a  
7 website?

8 A. I'm pretty sure I set up inhaleinside.com, and I set up  
9 the getrichsmoking.com. My wife did something with one of  
10 them. I don't recall which one. So, yes, I know those two I  
11 do remember definitely doing.

12 Q. All right. For inhaleinside.com, you are the one that  
13 created that website, right?

14 A. As I stated in my deposition, I edited the template that I  
15 then put on the website. I didn't actually create any  
16 websites. But, yes, as we described before, I edited a  
17 template, and that was my website. I did do that website,  
18 yes.

19 Q. So it went from nothing to a website, right?

20 A. Correct, yes.

21 Q. And you were the person that did that, right?

22 A. Yes.

23 Q. And you are the one that made the site go live on the  
24 Internet, right?

25 A. Yes.



1 Q. And you are the one that decided what content was in that  
2 website, right?

3 A. Yes.

4 Q. Okay. And is that the same for the websites you purchased  
5 and the other ones you purchased in 2009?

6 A. As I'm saying, I'm not sure exactly which ones I made  
7 live. I do remember doing inhaleinside. I do remember doing  
8 getrichsmoking. I do remember my wife using one of them -- I  
9 don't know which one it was -- or maybe she used two of them.

10 Q. And you said about how many do you currently own?

11 A. Around 50.

12 Q. Okay. And you are the one that maintains those websites,  
13 right?

14 A. 50 domains.

15 Q. Right.

16 But each one is a website, right?

17 A domain is a name for a website?

18 MR. SALAM: Object to the form of the question, your  
19 Honor. I think the problem is the difference between a domain  
20 and a website.

21 THE COURT: He can answer that. I understand. I  
22 have the same confusion, but he has got a quizzical look on  
23 his face.

24 So if you can answer it, answer it. If you don't  
25 understand the question --

1                   THE WITNESS: I don't understand the question.

2   BY MR. DAVIS:

3   Q. All right. Do you understand what a URL is?

4   A. Yes.

5   Q. What is that?

6   A. Where the website would be listed.

7   Q. What does it stand for, URL?

8   A. I don't know.

9   Q. Do you know if it is different than a domain name?

10   A. I do not know.

11   Q. And do you understand that a domain name is the address of  
12   a website?

13   A. That would make sense, yes.

14   Q. Right.

15                   That's what a person using the Internet types into  
16   the search bar, right?

17                   They put in the domain name, and when they hit  
18   "enter," their browser takes them to the website that they are  
19   looking for?

20                   Isn't that how it works?

21   A. Yes, absolutely.

22   Q. Okay. And you have 50 of those, right?

23   A. I have 50 domains, yes.

24   Q. Right.

25                   And how many live Internet websites do you have?

1 THE COURT: He says he doesn't know.

2 MR. DAVIS: You don't know.

3 BY MR. DAVIS:

4 Q. And for those -- but you do have some that are live,  
5 right?

6 A. Yes.

7 Q. All right. And for those to be live, someone has got to  
8 maintain them, right, to make sure they are working?

9 A. You have to put them up once, yes, and then they are  
10 working.

11 Q. That's it, and then you never look at them again?

12 A. Yeah, correct, you don't need to look at them again.

13 Q. All right. Is it your testimony that the websites you  
14 have live don't need any maintenance or service or any work to  
15 them done at any time?

16 A. That would be an accurate statement for some of my  
17 websites, yes.

18 Q. And what about the ones that it is not accurate for? Tell  
19 me about those. What do you do to keep them active?

20 A. I mean, you have to pay to keep them active.

21 Q. Right.

22 And do you do anything yourself, is my question, to  
23 maintain your websites?

24 A. I'm not understanding this question.

25 Q. All right. Well, let's take a look at PX-74, please.

1 I ask you to take a look at PX-74. It is a printout  
2 from -- as you can see at the bottom left corner, it is the  
3 inhaleinside.com website that you say you own, right?

4 A. Correct.

5 Q. And you received and reviewed this prior to today,  
6 correct?

7 A. Yes.

8 Q. All right. And do you dispute the accuracy of this in any  
9 way?

10 Does it accurately reflect your website as it  
11 appeared on or about July 19th of 2019?

12 A. It is definitely possible. I haven't looked at it in a  
13 long time, but, yes, it is possible.

14 Q. Okay. Do you have any reason to dispute it or deny it in  
15 any way?

16 A. No.

17 Q. Okay. And I'm asking you to look at the -- well, we just  
18 looked at the second page of it.

19 Would you like to flip through the first three pages  
20 and tell me if that accurately depicts your inhaleinside.com  
21 website?

22 A. It looks right.

23 Q. Okay. And now the next page of this exhibit is --

24 MR. DAVIS: We move 74 into evidence.

25 THE COURT: Any objection to 74?

1 MR. SALAM: No, your Honor.

2 THE COURT: Okay.

3 BY MR. DAVIS:

4 Q. I'm asking you now to take a look at PX --

5 THE COURT: It will be admitted.

6 (Plaintiff's Exhibit 74 was offered and received in  
7 evidence.)

8 MR. DAVIS: -- 75.

9 MR. SALAM: I'm sorry, 75?

10 THE COURT: Did you say 75?

11 MR. DAVIS: Yes, your Honor, PX-75.

12 BY MR. DAVIS:

13 Q. Mr. Duke, can you take a look at this and tell me if you  
14 recognize this?

15 A. I have seen it in your exhibits.

16 Q. Okay. And is this what's called the "source code" from  
17 your inhaleinside.com website as it existed on July 19th of  
18 2019?

19 A. Yes.

20 Q. Okay. And directing your attention to the first page of  
21 PX-75, and the lines are numbered. I will ask you to look at  
22 the third line.

23 Can you tell me what that says?

24 A. <Meta name="Author" content="Brent Duke" ><meta name=  
25 "keywords" content="e-cigarette, e-cig electronic, cigarette,

1 myinlife, inlife, revelle, elite, prestige, nicotine,  
2 smoking">

3 Q. And this is the source code of your website, right?

4 A. Correct.

5 Q. And at the very first line, it says "html."

6 Do you know what that means?

7 A. It is like the web -- the web language or whatever, but I  
8 don't know what it stands for.

9 Q. In your life, you have never understood what "html" stands  
10 for?

11 A. It is the web language. I know what it is, what it does.  
12 I don't know what it stands -- I don't know what it stands for  
13 though.

14 Q. Okay. How many other websites are you the author of the  
15 content of the meta names and keywords that you own?

16 A. I would not know without looking.

17 Q. But there are others, right?

18 A. Possibly, yes.

19 Q. All right. And you are the person that is the author of  
20 the content of the keywords in this website, right?

21 A. Correct. Yes, I filled this in.

22 Q. Okay. And the words that come after "content," and you  
23 read them out loud, "e-cigarette," "e-cig," "electronic," all  
24 the way to the last, which was the "smoking," those got into  
25 your website because you are the author, and you inserted

1 those words into the keywords, right?

2 A. Yes.

3 MR. DAVIS: Could I just take one moment, your Honor?

4 THE COURT: Sure.

5 And if I crunch the numbers correctly from yesterday,  
6 when we had two hours left, and we probably did at least a  
7 half hour, and now we are at 11:00, I think we are getting  
8 close, right? Or my math could be wrong.

9 (Brief pause.)

10 MR. DAVIS: Thank you, your Honor.

11 THE COURT: No problem.

12 BY MR. DAVIS:

13 Q. I'm going to turn your attention now to a person named  
14 Bryan Scott Kos.

15 Do you know who that is?

16 A. Yes. Kos, but yes.

17 Q. Kos?

18 A. Yes.

19 Q. Okay. And I want to get it right this time, right, so I'm  
20 going to ask you: What's his full name?

21 A. Bryan Scott Kos.

22 Q. And for the record, can you spell it, please?

23 A. B-r-y-a-n, S-c-o-t-t, K-o-s.

24 Q. And do you remember me asking you about him at your  
25 deposition?

1 A. Yes.

2 Q. And do you recall ever telling me or testifying that Bryan  
3 Scott was also the same as Bryan Scott Kos?

4 Did you ever say the name "Kos" at your deposition?

5 A. I don't recall.

6 Q. You don't remember?

7 A. No.

8 Q. All right. But your transcript would tell us, right,  
9 whatever you testified about?

10 A. Yes.

11 Q. Okay. And you told me at your deposition that this was a  
12 gentleman that introduced you to e-cigarettes in 2008. It was  
13 a guy you met in Bucktown.

14 Do you remember that testimony?

15 A. Yes.

16 Q. Okay. And you said his name at that time, you said he was  
17 Bryan Scott. Does he go by that name?

18 A. Yes, it is his middle name.

19 Q. All right. And does he go by "Bryan Scott" and leave off  
20 the "Kos" at times?

21 A. Yes.

22 Q. And why does he do that?

23 A. I don't know why he does what he does. You would have to  
24 ask him.

25 Q. And why did you represent him to me as a person named



1 "Bryan Scott" at your deposition and leave off the name "Kos"?

2 Do you know why you did that?

3 A. If you asked me about Bryan Scott, I would have told you  
4 about Bryan Scott. If you asked me about Brian Kos, I would  
5 have known who you were talking about.

6 Q. It is one in the same person, though, right?

7 A. Yes, but I would have known who you were talking about.  
8 So whatever you said to me, that's what I would have replied  
9 to.

10 Q. Got you.

11 So your deposition, why did you never disclose that  
12 Mr. Kos was the director of sales and marketing for your  
13 company?

14 A. Did you ask me that?

15 Q. I did. I asked you who is he.

16 MR. SALAM: Objection, your Honor. I have reviewed  
17 the deposition, and --

18 MR. DAVIS: I'm going to object to a speaking  
19 objection.

20 THE COURT: Hold on.

21 Are you going to say it is not impeaching? Because  
22 we can go through the exercise --

23 MR. SALAM: I would ask him to refer to the  
24 deposition testimony where he asks the question that requires  
25 that answer, and I don't believe there is any.

1 THE COURT: Okay. Show him the dep transcript.

2 BY MR. DAVIS:

3 Q. Let's pull up your transcript from June 17th at Page 397.

4 THE COURT: So sustained.

5 MR. SALAM: Thank you, your Honor.

6 BY MR. DAVIS:

7 Q. June 17th, Page 397, of Mr. Duke's deposition.

8 Page 397.

9 A. It only appears to be 334 pages.

10 Q. Mr. Duke, you are now being shown a page from your  
11 deposition transcript.

12 Do you understand that?

13 A. Yes.

14 Q. This is from your June 17th, 2015, deposition.

15 Do you understand that?

16 A. Yes.

17 Q. I'm going to ask you to take a look at that, read it, and  
18 tell me if it refreshes your recollection as to what you told  
19 me about Mr. Bryan Scott.

20 A. Can you go to the next page?

21 Q. Yes, now displaying Page 398 of your June 17th, 2015,  
22 deposition.

23 A. Is there --

24 THE WITNESS: May I ask for clarity, your Honor?

25 THE COURT: He is asking if it refreshes your

1 recollection as to what you testified about Bryan Scott.

2 Did that help you remember what --

3 THE WITNESS: It doesn't help with the question.

4 BY MR. DAVIS:

5 Q. So go back to Page 397.

6 Do you see that in front of you?

7 A. Yes.

8 Q. All right.

9 THE COURT: Now, give me a moment.

10 MR. SALAM: Your Honor --

11 THE COURT: Give me a moment.

12 MR. SALAM: Oh, sorry.

13 THE COURT: Okay. So go ahead and ask a question,  
14 and then we will see what the objection is.

15 BY MR. DAVIS:

16 Q. At Page 397 of your deposition, Line 9, I asked you:

17 "Q. Who is Bryan Scott?"

18 And your answer was at Lines 10 and 11:

19 "A. He is a gentleman I met in 2008 who introduced  
20 me to electronic cigarettes."

21 Is that right?

22 A. That's a correct statement, yes.

23 Q. Right.

24 And you did not disclose at that time that he was  
25 your director of sales and marketing, right?

1           That's not part of your answer?

2       A.   He was not, at that time, my director of sales and  
3       marketing.

4           THE COURT:   When you say "at that time," do you mean  
5       2008 or when your deposition was taken?

6           THE WITNESS:   Either of those two times.

7           THE COURT:   Okay.

8           MR. SALAM:   Your Honor, my objection is to the extent  
9       he asked "Does this refresh your recollection?"   I'm fine if  
10      it is as to this question and answer.   He had asked broadly  
11      "to your testimony about Bryan Scott."   There is a significant  
12      amount of testimony about Bryan Scott in the deposition, and  
13      I'm uncomfortable with the witness being asked about his  
14      testimony when he has not had a chance to review the stuff  
15      that relates to Bryan Scott.

16          THE COURT:   Okay.   Overruled.   He is simply asking  
17      him about Bryan Scott, whether he was identified as Bryan  
18      Scott, Bryan Scott Kos or Kos, and whether he was the director  
19      of sales.

20          The deposition transcript has the question:

21          "Q.   Who is Bryan Scott?

22          "A.   He is a gentleman I met in 2008 who introduced  
23      me to electronic cigarettes."

24          The follow-up questions related to whether or not  
25      Bryan Scott or Bryan Scott Kos was director of sales, I think

1 Mr. Duke just said that Bryan Scott or Bryan Scott Kos was not  
2 a director of sales and marketing either in 2008 or when his  
3 deposition was taken.

4 Is that accurate?

5 THE WITNESS: That would be accurate, your Honor.

6 THE COURT: Okay. Go ahead and follow up.

7 BY MR. DAVIS:

8 Q. And at the time of your deposition, my question of who was  
9 Bryan Scott, did I limit the question to a time period?

10 A. I mean, no, you did not. No, you did not limit the time  
11 period.

12 Q. Right.

13 And you knew in 2015, when I took your deposition,  
14 that Mr. Bryan Scott was also known as Bryan Scott Kos, right?

15 A. Yes.

16 Q. And you knew that he was your director of sales and  
17 marketing, right?

18 A. In the past, he had been.

19 Q. In the past, this gentleman had been the director of sales  
20 and marketing for your company, right?

21 A. Yes.

22 Q. Okay. And nowhere during your deposition over three days  
23 did you disclose Mr. Bryan Scott as your  
24 director -- previously as your director of sales and  
25 marketing, right?

1 A. Correct.

2 Q. Okay. And --

3 THE COURT: When was he your director of sales and  
4 marketing?

5 THE WITNESS: It would have been, like, 2012, 2013.

6 THE COURT: Okay.

7 THE WITNESS: For a brief period of time.

8 THE COURT: Okay. Go ahead, Mr. Davis.

9 BY MR. DAVIS:

10 Q. And if we can now look at PX-37.

11 PX-37 is a January 8, 2009, e-mail from Mr. Duke to  
12 himself, forwarding a chat session with Ms. Saraswat. It is  
13 Defendants' June 1, 2018, paper production, Bates-stamped  
14 21C 1000004 through 16.

15 Can we go to the first page?

16 I ask you to look at the screen in front of you and  
17 tell me if you recognize this document.

18 A. I saw it when preparing for this.

19 Q. Do you recognize this document?

20 A. It's ten years old, so not really, but I saw it preparing  
21 for this. I'm sure it is real, if that's what you are asking.

22 Q. I'm asking you do you recognize it?

23 A. I recognize it because I saw it a few days ago in  
24 preparation.

25 Q. You recognize it as an e-mail that you sent to yourself on

1 January 8th, 2009?

2 A. I do not remember sending myself an e-mail January 8,  
3 2009.

4 Q. Do you dispute in any way that you sent yourself this  
5 e-mail on January 8, 2009?

6 A. I do not dispute that I sent it.

7 Q. Okay. And this is an accurate copy of the e-mail that you  
8 sent yourself on January 8, 2009, right?

9 A. Yes.

10 Q. Okay. And what is contained in this e-mail?

11 A. A lot.

12 Q. Excuse me?

13 A. There is a lot of stuff in this e-mail.

14 Q. Well, tell me what's contained in it.

15 You sent it to yourself. What did you send yourself?

16 MR. SALAM: Your Honor, I would ask that the witness  
17 be allowed to actually read the whole document.

18 THE COURT: Do you need to read the whole document?

19 I assume the question that is being asked is does it contain a  
20 Yahoo! Chat between you and Kirti Saraswat?

21 THE WITNESS: Yes.

22 THE COURT: Okay. Do you need to read the text?

23 THE WITNESS: If he wants something specific.

24 THE COURT: All right. If you want something  
25 specific, go ahead and direct him to that point, okay?

1 MR. SALAM: Thank you, your Honor.

2 THE COURT: Okay.

3 BY MR. DAVIS:

4 Q. And just so I'm clear, this contains a Yahoo! -- a copy of  
5 a Yahoo! Chat session that you copied and pasted into an  
6 e-mail you sent yourself on or about that date, January 8th,  
7 2009; is that right?

8 A. Yes.

9 Q. And that was a chat with SEO examples with someone named  
10 Kirti; is that right?

11 I'm looking at the first line of the e-mail you sent  
12 yourself.

13 A. That seems to be how I memorialized it, yes.

14 Q. And you wrote that first line, right?

15 A. Yes.

16 Q. Okay. And when you look at that string of information  
17 throughout the balance of this e-mail, it's a chat session,  
18 meaning you're instant messaging; is that right?

19 A. Yes.

20 Q. And it is between you and -- who is the person you are  
21 messaging with?

22 A. Kirti Saraswat.

23 Q. All right. And that's the same throughout this entire  
24 string, right?

25 A. Yes, I assume so.



1 Q. Okay.

2 A. Scrolling all the way to the bottom of it.

3 But, yes, I would imagine it would be with her.

4 MR. DAVIS: All right. We move 37 into evidence.

5 MR. SALAM: No objection, your Honor.

6 THE COURT: Okay. 37 will be admitted.

7 (Plaintiff's Exhibit 37 was offered and received in  
8 evidence.)

9 MR. DAVIS: Oh, if I didn't do it before, I'm asking  
10 to move in 74 and 75. That was the exhibits -- Plaintiff's  
11 Exhibit 74 was the Defendants' inhaleinside.com website.

12 THE COURT: I have that as admitted already.

13 75 is the deposition transcript, right?

14 MR. DAVIS: No, 75 is the source code.

15 THE COURT: Oh, yes, sorry.

16 MR. SALAM: No objection.

17 THE COURT: All right. Thank you.

18 75 will be admitted. Thank you.

19 (Plaintiff's Exhibit 75 was offered and received in  
20 evidence.)

21 BY MR. DAVIS:

22 Q. I'm going to turn your attention, Mr. Duke, now to an  
23 e-mail you exchanged with Robert Hough in January of 2012.

24 I'm going to ask you to take a look at Plaintiff's Exhibit 35.

25 This is from your June 1, 2018, paper production.

1           THE COURT: Oh, and before I forget, just to add more  
2 confusion as to Bryan Scott, Bryan Scott Kos, in the  
3 deposition transcript, his name is spelled B-r-i-a-n. I heard  
4 it was B-r-y-a-n.

5           So I don't know what it is, but it is all one in the  
6 same person. We can all agree on that, right?

7           THE WITNESS: Yes.

8           THE COURT: Okay. Go ahead.

9           MR. DAVIS: Thank you.

10 BY MR. DAVIS:

11 Q. Plaintiff's Exhibit 35 is Bates-stamped 21C 1002509  
12 through 2510, I believe.

13           And I think the third page of it doesn't have a Bates  
14 number because it comes from the native version of the same  
15 document that was produced electronically on May 31, 2018.

16           And just so the record is clear, this is a three-page  
17 exhibit, and the reason we have all three pages is because the  
18 second page has something in the middle that I don't know what  
19 it is, but it makes it difficult to read the entire e-mail.  
20 So the third page, we went to the native data and retrieved it  
21 the way it was produced without that portion that's hard to  
22 read.

23           Mr. Duke, can you take a look at this and tell me if  
24 you recognize it?

25           MR. SALAM: Objection, your Honor, to form. I'm not

1     sure which page he is referring to.

2             THE COURT:   Is it all one exhibit?

3             MR. DAVIS:   It is one exhibit.

4             THE COURT:   Okay.   Do you recognize the exhibit?

5             THE WITNESS:  I recognize it from preparing for  
6     today.

7             THE COURT:   Overruled.

8             MR. SALAM:   Thank you, your Honor.

9     BY MR. DAVIS:

10    Q.   And do you confirm this is an accurate e-mail that you  
11    exchanged with Mr. Hough on January 30th of 2012?

12    A.   It looks like it.

13    Q.   Okay.   And any question in your mind on the first page, at  
14    the bottom, you sent an e-mail from your Yahoo! e-mail account  
15    to Mr. Hough at his live.com account, right?

16    A.   Correct.

17    Q.   You don't dispute that you sent this e-mail, right?

18    A.   No.

19    Q.   Okay.   And focusing your attention on the first paragraph,  
20    could you read that, please?

21    A.   "I am hoping you can start really focusing on general  
22    online" --

23             THE COURT:   Wait.   Slow down.

24             THE WITNESS:  I'm sorry.

25             THE COURT:   That's okay.

1                   THE WITNESS: "I am hoping you can start really  
2 focusing on general online visibility...answering yahoo,  
3 answer questions, and sourcing us, etc, etc."

4 BY MR. DAVIS:

5 Q. And the next paragraph?

6 A. "And then we need to get working on the site that will  
7 list automatic, 21 century smoking, and maybe blu, and  
8 greensmoke possibly?...obviously we need to figure out how to  
9 actually make the link to their site not even work but still  
10 have the site on this site...then when sourcing on yahoo  
11 answers, etc, it will allow us to appear to be giving unbiased  
12 links."

13 Q. And continue.

14 A. "Like right now with just the term electronic cigarettes,  
15 I think there are like 9 open questions. Gracias."

16 Q. And who is Blu and Green Smoke?

17 A. Two electronic cigarette companies.

18 Q. And were they electronic cigarette companies in or about  
19 January of 2012?

20 A. Yes.

21 Q. And are they big competitors of yours?

22 A. They were the two biggest online competitors, I would say,  
23 yes.

24 MR. SALAM: Objection, your Honor, relevance.

25 THE COURT: Hold on.

1 MR. SALAM: Objection to relevance.

2 THE COURT: Okay. Response?

3 MR. DAVIS: The response is, your Honor, that the  
4 relevance is one of the central questions in this case that  
5 was addressed by Judge Kapala in his ruling was that if it is  
6 true that the Defendant misused my client's trademark in his  
7 website or used it as part of his marketing with contacting  
8 wholesalers like Don Kunz or did other things to mislead  
9 consumers, like taking their e-mails and misleading them as to  
10 who they were and trading off of my client's goodwill, then  
11 that would go to our affirmative defense, equitable defense,  
12 of unclean hands.

13 THE COURT: Right.

14 MR. DAVIS: Here, an e-mail that was never produced  
15 before, and withheld from production, we contend -- we didn't  
16 get it until June 1 of 2018 -- shows that Mr. Duke is  
17 directing Rob Hough, at his live.com e-mail account, which is  
18 one of the sub-issues here, but he is asking him to use  
19 competitors' names in connection with his website and his  
20 marketing of his business.

21 THE COURT: So he got this e-mail in 2018, which goes  
22 to a main issue in the case. You didn't get it until 2018.  
23 Obviously, you deposed him in 2015. It affects how you would  
24 have deposed Mr. Duke and how you would have litigated the  
25 case had you gotten it before 2018?

1 MR. DAVIS: Yes, your Honor.

2 THE COURT: Is that what you are saying?

3 Okay. I think it is relevant to the motion.

4 MR. SALAM: And I believe this has all been  
5 established.

6 Yes, your Honor, I understand it is relevant to that.

7 THE COURT: Okay.

8 MR. SALAM: Okay. I will let him continue -- I'm  
9 sorry. I will sit down and wait for the next question.

10 THE COURT: Okay. All right. That's how I see it as  
11 relevant. You objected to relevance. He explained. And  
12 that's where I thought he was going, but I want to make sure  
13 because I try not to assume too much because it is dangerous,  
14 but that's exactly where I thought it was going, which is a  
15 main component to the sanctions motion. So I will overrule  
16 the objection.

17 And let's go ahead and ask your next question.

18 MR. DAVIS: Thank you, your Honor.

19 BY MR. DAVIS:

20 Q. My question was: What are you telling your employee,  
21 Robert Hough, to do in this e-mail?

22 A. We were going to try to create a review site, and we were  
23 just spit-balling ideas.

24 Q. And that review site would have been used in connection  
25 with the marketing of your company's products, right?

1 A. Of course, yes.

2 Q. Yes.

3 And you were going to use competitors' names like Blu  
4 and Green Smoke in connection with that strategy, right?

5 A. The largest competitors, yes.

6 Q. Yes.

7 And you were going to use their names, but put  
8 it -- to use your words, to make the link to their site not  
9 even work, right, so that if they came to your site, they  
10 couldn't leave your site, right?

11 Is that what that means?

12 A. I don't know exactly what I was saying there, but, no, it  
13 wouldn't be going to my site, no.

14 Q. You are creating a site to trick your customers into  
15 buying your products, right, by using competitors' names and  
16 putting broken links in?

17 Isn't that what you are doing?

18 A. No.

19 Q. Okay. And was it your decision alone to withhold this  
20 e-mail and never produce this e-mail prior to the court order  
21 in 2018?

22 A. I don't understand that question.

23 Q. We never got it before June 1, 2018, when the court  
24 ordered you to produce this.

25 I'm asking you: You had it. It was in your Yahoo!

1 e-mail account. It hit our ESI search terms. Was it your  
2 decision alone to withhold this document from production?

3 MR. SALAM: Objection, your Honor, foundation and  
4 asked and answered.

5 THE COURT: Those seem to be mutually exclusive in my  
6 head.

7 I will sustain as to foundation.

8 Break it up into a couple -- two or three questions  
9 and unpack it a little bit, okay?

10 BY MR. DAVIS:

11 Q. At some point in time, your attorneys in this case were  
12 asking you to find e-mails, right?

13 A. Yes.

14 Q. And that was throughout the course of the litigation,  
15 right?

16 A. Yes.

17 Q. And you were the one that was searching your e-mails to  
18 find responsive e-mails, right?

19 A. Whatever the attorneys were asking for, I was searching  
20 for, yes.

21 Q. And you got them and gave them to your attorneys, right?

22 A. Correct.

23 Q. And this e-mail was in your Yahoo! e-mail account as of  
24 January 29th, 2012, right?

25 A. Correct.



1 Q. All right. And my question is: Was it your decision not  
2 to give this e-mail to your attorneys when they were asking  
3 you for e-mails during the course of the litigation?

4 A. I don't know exactly how to answer that question.

5 Q. Okay. What would you need to know to answer it?

6 A. I just don't understand the question.

7 Q. What part of it don't you understand?

8 A. The entire question. I do not understand the question.

9 THE COURT: Did you apply the search terms -- I think  
10 I know the answer to this.

11 Did you apply the search terms to your Yahoo! e-mail  
12 account?

13 THE WITNESS: As previously stated, no.

14 THE COURT: Yeah, okay, that's what I thought the  
15 answer was.

16 THE WITNESS: So there was no conscious decision not  
17 to give this. So I don't know exactly --

18 THE COURT: Okay.

19 THE WITNESS: -- what the question is.

20 THE COURT: Did you know that there was an issue as  
21 to the meta tag being in the Plaintiff's website?

22 THE WITNESS: Yes.

23 THE COURT: Okay. When did you learn of that?

24 THE WITNESS: The day of the Marty Hughes -- is that  
25 his name? The day of the Marty Hughes's filing, whatever the

1 date is.

2 THE COURT: And I don't know what the date of that  
3 is.

4 MR. DAVIS: March of 2013, when we filed an  
5 application for a preliminary injunction against the Plaintiff  
6 [sic] and his company, and contained in that motion was a  
7 declaration from someone from my client's office who found the  
8 meta -- found the source code or looked at the source code and  
9 determined that in the Defendants' website, my client's  
10 registered, federally registered trademark, 21 Century Smoke,  
11 was contained in the keywords of the metadata of his website.

12 THE COURT: So that was in 2013. You were aware that  
13 that was an issue. Did you go back and search to find this  
14 e-mail that relates to, essentially, placing metadata in a  
15 website?

16 THE WITNESS: I'm not really discussing metadata in  
17 this e-mail, and I don't know what search term I would have  
18 done that would have brought me to this e-mail.

19 THE COURT: Well, you said you don't know the search  
20 terms, right?

21 THE WITNESS: No, that's what I'm saying. I don't  
22 know what I would have hit as a search term that would have  
23 taken me to this specific e-mail.

24 THE COURT: Okay. I don't know how else -- this  
25 e-mail is abundantly relevant to the case.

1           Go ahead and make your objection, and we will see if  
2   we can --

3           MR. SALAM: Well, I object, that I believe it's based  
4   on a misstatement of his prior testimony.

5           THE COURT: The question or his answer?

6           MR. SALAM: The whole line of --

7           THE COURT: Overruled.

8           Go ahead and ask a new question.

9   BY MR. DAVIS:

10   Q. Did you ever give this e-mail that's in front of you,  
11   Plaintiff's Exhibit 35, did you ever give this e-mail to any  
12   of your prior attorneys in this case prior to June 1, 2018?

13   A. No.

14   Q. And following up on something you said a moment ago, you  
15   said the first time you learned about the issue the Judge just  
16   asked you about, which was Plaintiff's registered trademark  
17   being in the metadata of your website, was when you first read  
18   the Marty Hughes declaration; is that right?

19   A. Correct.

20           MR. DAVIS: I have nothing further, your Honor.

21           THE COURT: Okay. The exhibit you have in front of  
22   you, while we are on it, Exhibit 35, you said you didn't give  
23   it to your attorneys.

24           Obvious question is: Why not?

25           THE WITNESS: Apparently, there is 15,000 e-mails.

1     There appears to be 15,000 documents produced, of which none  
2     of them were given to the attorneys because the terms were  
3     never searched on my e-mail.

4             THE COURT:   Well, we know that the terms weren't  
5     searched on the GoDaddy accounts, correct?

6             THE WITNESS:   Correct.

7             THE COURT:   Maybe it is going on now.

8             Search terms were applied to the CPUs, right, the  
9     towers?

10            Were they applied, if you know, to the Yahoo!  
11     accounts, if you know?

12            THE WITNESS:   That was the May, is the Yahoo!  
13     account.

14            THE COURT:   Okay.   All right.

15            THE WITNESS:   That's where this came from.

16            THE COURT:   Okay.   Are you done?

17            MR. DAVIS:   Move 35 into evidence.

18            THE COURT:   Okay.   Any objection?

19            MR. SALAM:   No objection, your Honor.

20            THE COURT:   Okay.   35 will be admitted.

21     (Plaintiff's Exhibit 35 was offered and received in  
22     evidence.)

23            THE COURT:   Give me a moment.   We have got most of  
24     that.

25            All right.   Have you talked on your side who wants

1 to -- how to coordinate questioning of witnesses, whether,  
2 Mr. Salam, you want to start, and then we follow up with  
3 Mr. Smith, Ms. Rich, and other counsel?

4 MR. SALAM: I had discussed with attorneys for former  
5 defense counsel and Plaintiff's counsel that we would prefer,  
6 and I think it will make it more efficient, if they go ahead  
7 and ask -- former defense counsel's attorneys ask questions of  
8 Mr. Duke, and that way I can then address or redirect, however  
9 you want to call it --

10 THE COURT: Okay.

11 MR. SALAM: -- and hopefully cover everybody, as  
12 opposed to I go, and then they go, and then it would just make  
13 for a lot.

14 THE COURT: Look, if you have an agreement on that --

15 MR. SMITH: No, this is the first time I have heard  
16 this, and I believe your Honor indicated, when we first  
17 discussed this, that you assumed, and I recognize, your Honor,  
18 it was an offhand comment, that the Plaintiffs would go, and  
19 the Defendants would go, and we will follow on.

20 If you want me to go next, I'm happy to do that, but  
21 I didn't see it coming.

22 THE COURT: Okay.

23 MR. SMITH: I'm sorry.

24 THE COURT: Mr. Holevas, are you going to ask any  
25 questions?

1           MR. HOLEVAS: Yes, I will, your Honor, whatever the  
2 court's preference is as to the order.

3           THE COURT: Look, again, I'm listening to the  
4 evidence, and I want to hear as best -- in a way that's going  
5 to be easy for my brain to digest. So whatever works  
6 procedurally among you folks, I'm not going to squabble. If  
7 you want to think about it -- it is 11:30. Do you want a  
8 couple of minutes to think about it?

9           MR. SMITH: No, I can tell you exactly my preference.

10          THE COURT: Okay. What's your preference?

11          MR. SMITH: I mean, my preference is -- we have  
12 already sat here and we have seen Mr. Duke at certain times  
13 place certain blame on the lawyers. I assume we may hear more  
14 of that. I would like to follow up after we hear what  
15 Mr. Salam's direct is. That would be my preference.

16          THE COURT: All right. What is your view,  
17 Mr. Holevas?

18          MR. HOLEVAS: That seems to make sense as far as  
19 procedurally and the most efficient way to approach it.

20          THE COURT: All right. Somebody is popping up in the  
21 back.

22          MR. WOLFE: Yes, Mark Wolfe for Mr. Shonder.

23                I know I have been quiet, but I represent  
24 Mr. Shonder, and I agree.

25          MR. SALAM: I have no problems going next, your

1 Honor. That's all right.

2 THE COURT: That's fine. See, it works out.

3 So the witness just finished. Do you want some time  
4 to get prepared?

5 MR. SALAM: I would, your Honor.

6 THE COURT: Okay. It is 11:30. Do you want to come  
7 back at -- I have got to go explain the Fourth Amendment to  
8 the United States Government again.

9 Do you want to come back at 1:00 so you have the  
10 lunch hour?

11 MR. SALAM: That would be fine, and I hope to get  
12 done within a couple hours.

13 MR. SMITH: Are you sure, your Honor, that's enough  
14 time for you to get the Fourth Amendment explained?

15 THE COURT: Clearly, it is not enough time, because  
16 we have had these conversations.

17 So we will come back at 1:00. That will give you  
18 some time to prep. And we will go from there.

19 Again, you are under oath. Don't talk about your  
20 testimony.

21 We will come back right at 1:00 o'clock, ready to go,  
22 okay?

23 MR. HOLEVAS: Your Honor, one thing: I would assume  
24 after Mr. Salam, would you like Mr. Smith to go first, and  
25 then me?

1 THE COURT: Whoever wants to go.

2 MR. HOLEVAS: It doesn't matter to me.

3 MR. SMITH: We are happy to do that. We assumed as  
4 much.

5 THE COURT: Okay. Thank you.

6 MR. HOLEVAS: Thank you, Judge.

7 (Recess taken.)

8 THE COURT: All right. Is Mr. Duke going to testify?

9 MR. SALAM: Excuse me?

10 THE COURT: I'm ready.

11 MR. SALAM: Mr. Duke?

12 Your Honor, I'm going to go old school. I'm  
13 referring to exhibits that are in the binder.

14 THE COURT: Okay.

15 MR. SALAM: As opposed to -- when I'm referring to  
16 Plaintiff's and Defendants'.

17 THE COURT: Do you have all your binders in front of  
18 you or just your binders?

19 MR. SALAM: I have all the ones I will be referring  
20 to, and I have left copies for the witness as well. I just  
21 wanted to give you a heads up.

22 THE COURT: Well, I appreciate that. I just need to  
23 pull them up front and get them in front of me. So thanks for  
24 letting me know.

25 MR. SALAM: And I believe -- and Ms. Rich has been



1 kind enough that when we refer to LS exhibits, she will  
2 project them for us since I don't have an extra copy for the  
3 witness.

4 THE COURT: I have to promise to plant a tree on  
5 Arbor Day.

6 All right. I have all the exhibits. So whenever you  
7 are ready, let me know.

8 CROSS-EXAMINATION

9 BY MR. SALAM:

10 Q. Good afternoon, Mr. Duke.

11 A. Good afternoon.

12 Q. What I would like to do is start by going in reverse  
13 order. I would like to direct your attention to Plaintiff's  
14 Exhibit 35 in the binders. There should be a set.

15 And let me know when you have found Plaintiff's  
16 Exhibit 35.

17 A. Okay.

18 Q. And you recall being questioned about this e-mail from  
19 Mr. Hough to you? It is dated January 30th.

20 A. Yes.

21 Q. I think, and correct me if I'm wrong, but you testified  
22 yesterday that you did not decide what your attorneys produced  
23 in this case, correct?

24 A. Correct.

25 Q. Whenever your attorneys asked you for documents, you would

1 run searches through the e-mails; is that correct?

2 A. Correct.

3 MR. DAVIS: Objection, leading.

4 THE COURT: It's foundational.

5 Go ahead.

6 MR. SALAM: Thank you, your Honor.

7 THE COURT: Overruled.

8 BY MR. SALAM:

9 Q. And when you ran those searches, you would find certain  
10 e-mails, correct?

11 A. Correct.

12 Q. And what would you do with those?

13 A. Save them and then send them to the lawyers.

14 Q. Do you recall if you ever did not send something to your  
15 lawyers that came up as a result of one of the searches they  
16 asked you to run?

17 A. No, I sent everything that came up in searches.

18 Q. Now, directing your attention to Plaintiff's Exhibit 35,  
19 do you recall if this document ever came up as one of the  
20 documents that you found as a result of one of the searches  
21 your attorneys asked you to conduct?

22 A. No, I was never asked for a search that brought up this  
23 document.

24 Q. If that document had come up, what would you have done  
25 with it?

1 A. I would have sent it to the attorneys.

2 Q. Earlier today, Mr. Davis -- I'm sorry, Mr. Davis was  
3 referring to Exhibit 35 and asked you or stated that this  
4 shows you trying to trick a customer into buying your product.

5 Do you recall that?

6 A. Yes.

7 Q. Had you ever tried to trick a customer into buying your  
8 product?

9 A. No.

10 Q. Can you explain to me what you and Mr. Hough were  
11 discussing here in Exhibit 35 as far as the -- I'm referring  
12 to that bottom half of this document that he asked you to  
13 read. Can you explain to me what you and Mr. Hough were  
14 discussing there?

15 A. Just trying to figure out how to put together a review  
16 site for electronic cigarettes, and, obviously, prominently  
17 feature our own websites, of course. But, yes, that's what we  
18 were working on. We never did it, but that's what we were  
19 discussing.

20 Q. Okay. And so -- and you said you never did it. So  
21 although you discussed it, you never actually put together a  
22 review website, correct?

23 A. No.

24 Q. Okay. So you never put together a review website that had  
25 links that didn't work, correct?

1 A. No. As Robert Hough said, that wouldn't be a good idea  
2 anyway.

3 Q. Okay. I would like to direct your attention to  
4 Plaintiff's Exhibit 37.

5 I have one more question on Plaintiff's Exhibit 35:  
6 Does what's being discussed in Plaintiff's Exhibit 35 between  
7 you and Mr. Hough involve manipulating metadata at all?

8 A. No, of course not.

9 MR. DAVIS: Objection, leading.

10 THE COURT: What does it discuss?

11 BY MR. SALAM:

12 Q. Did you discuss -- with respect to the matters here, did  
13 you discuss manipulating metadata?

14 THE COURT: What, if anything, relating to metadata  
15 is discussed in Exhibit 37?

16 THE WITNESS: Nothing.

17 THE COURT: Okay.

18 MR. SALAM: Thank you, your Honor.

19 BY MR. SALAM:

20 Q. Again, I direct your attention now to Exhibit 37, and I  
21 would like you to take the time to review this chat.

22 Well, let me strike that.

23 You have seen this chat before today, correct?

24 A. Yes.

25 Q. I think you testified that you had seen it in preparation

1 for this hearing?

2 A. Yes.

3 Q. In preparation for this hearing, do you recall reading  
4 this whole chat?

5 A. Yes.

6 Q. Okay. Can you tell me which website -- or strike that.

7 From reading this chat, can you tell what website is  
8 involved -- I'm sorry, strike that, let me rephrase that.

9 What you and Ms. Saraswat are discussing here, does  
10 it refer -- which website does it refer to?

11 A. Primarily, Sports Doctrine.

12 Q. Okay. And what's Sports Doctrine?

13 A. It was a website that I had her design for me -- or  
14 create, design.

15 Q. And what's the date of this e-mail?

16 A. January 8th, 2009.

17 Q. Did 21 Century Smoking exist at that date, if you recall?

18 A. Right at around that date, I had purchased that website.  
19 I don't recall if it was right before or right after that.

20 Q. You said you purchased that website.

21 Did you purchase a website or a domain?

22 A. Domain.

23 Q. Had you yet put your -- had the 21 Century Smoking website  
24 been created as of January 2009?

25 A. No, no.

1 Q. All right. I would like to direct your attention to  
2 Plaintiff's Exhibit 74, and I believe -- do you recall  
3 testifying about Plaintiff's Exhibit 74 this morning or prior  
4 to lunch?

5 A. Yes.

6 Q. Okay. And this is inhale's -- a web page from  
7 inhaleinside.com, correct?

8 A. Yes.

9 Q. Do you see at the top, there is a line that says -- well,  
10 let me ask you: Do you see the line at the top of Plaintiff's  
11 Exhibit 74?

12 A. Yes.

13 Q. Can you read that for the record, please?

14 A. "Great MLM Opportunity with the Best Electronic Cigarette,  
15 Living the inLife."

16 Q. Can you -- do you have an understanding of what "MLM"  
17 means?

18 A. Yes.

19 Q. And what is your understanding?

20 A. Multilevel marketing.

21 Q. And are you aware of -- can you explain to the court what  
22 multilevel marketing -- what you understand "multilevel  
23 marketing" to be?

24 A. It is kind of like Amway. So you have a product you are  
25 selling, and you have distributors below you and above you,

1 and you get a little piece of the action, essentially, for  
2 anything that happens below you.

3 Q. Okay. And can you explain what -- or it says "Great MLM  
4 Opportunity." Can you explain what -- or why you created this  
5 website?

6 A. Because I had joined a company called "My inLife," and it  
7 was an MLM for electronic cigarettes, and that's how I  
8 discovered electronic cigarettes. That's how I had discovered  
9 electronic cigarettes initially.

10 Q. So how would you use a website that -- inhaleinside.com or  
11 what were you trying to achieve by creating this website?

12 A. Basically, just promote this product that I was trying to  
13 sell in a way that I could have somewhere where I could  
14 promote it as opposed to the landing page for the overall  
15 website. So there is a My inLife website. I was trying to  
16 find a way to get a landing page that was aside and apart from  
17 that landing page.

18 Q. And so what was your -- would you benefit -- how would you  
19 benefit from that?

20 A. It gave me an opportunity to advertise. I could make  
21 flyers, I could hand them out, and I could then have somewhere  
22 where people would go. So it gave me an opportunity to  
23 promote the product.

24 Q. Okay. And if they came to this website, then what would  
25 you do with a visitor? What were you trying to achieve with

1     them?

2     A.   I was trying to get them to sign up as a distributor below  
3     me or call me and buy product from me.

4     Q.   Did you create more than one website for, like, this  
5     purpose, for this MLM marketing?

6     A.   Yes.

7     Q.   Do you recall how many?

8     A.   The getrichsmoking we discussed earlier.   I believe this  
9     steamnicotine, the My inLife -- or not My inLife -- the  
10    inhaleinside, and there may be a couple others.

11    Q.   I would like to direct your attention to Plaintiff's  
12    Exhibit 76.

13                 Do you recall your testimony from prior to lunch  
14    concerning this exhibit?

15                 I'm sorry.

16                 THE COURT:   I don't remember 76.

17    BY MR. SALAM:

18    Q.   Plaintiff's Exhibit 75, the source code.

19                 THE COURT:   I do remember 75.

20                 MR. SALAM:   I apologize.

21                 THE COURT:   I thought I missed a document.

22                 MR. SALAM:   I could tell from the witness's dazed  
23    look I was looking in the wrong place.

24                 THE COURT:   75.

25                 THE WITNESS:  Yes, I do recall.



1 BY MR. SALAM:

2 Q. And this is the source code for Plaintiff's Exhibit 74,  
3 correct?

4 A. Correct.

5 Q. Okay. Did you write this source code?

6 A. No.

7 Q. How did you create the inhaleinside.com website?

8 MR. DAVIS: Objection, asked and answered.

9 MR. SALAM: Not during -- I'm sorry.

10 THE COURT: Well, I know you asked him about it.

11 But overruled.

12 Go ahead.

13 BY MR. SALAM:

14 Q. How did you create -- you testified that you created this  
15 website, correct?

16 A. Yes.

17 Q. How did you create that website?

18 A. At this point, I'm not sure if I yet had Dreamweaver. It  
19 may have been Notepad, just the Notepad app on a normal  
20 computer, or maybe I had Dreamweaver at this point. I don't  
21 recall. But I just took a template and just filled in what I  
22 wanted filled in over the template.

23 Q. Okay. What is -- when you said "Dreamweaver," what are  
24 you referring to?

25 A. It is a program that helps you create a website.

1 Q. Okay. And you testified you didn't write this code that's  
2 appearing on Page 75, correct?

3 A. No. I mean, there is places I filled in, but I did not  
4 write the code.

5 Q. All right. So you would have written -- referring back to  
6 74, the contents of Plaintiff's Exhibit 74, that would have  
7 been content you created, correct, or wrote?

8 A. Yes.

9 Q. Okay. And then how did you -- how did this content become  
10 the coding on Plaintiff's Exhibit 75?

11 A. You just save it as an .html.

12 Q. In Notepad or Dreamweaver?

13 A. Yes, through Notepad or Dreamweaver, you save it as .html.

14 Q. Okay. And you testified -- looking, again, at the top of  
15 Plaintiff's Exhibit 75, and then on the left, you see there  
16 are line numbers?

17 A. Yes.

18 Q. Okay. And do you recall testifying that -- I'm  
19 sorry -- Mr. Davis asked you to read lines 3 through,  
20 approximately, 5?

21 Do you recall that?

22 A. Yes.

23 Q. Okay. Or 4, maybe, is what the record will reflect.

24 And it indicates you are the author, correct?

25 A. Yes.

1 Q. Okay. And then it has keywords, correct?

2 A. Yes.

3 Q. And did you insert these keywords here, "e-cigarette,"

4 "e-cig," et cetera?

5 A. Yes.

6 Q. And how did you do that?

7 A. By putting them where it said "Insert keywords here." I

8 put keywords there.

9 Q. And when you say by putting it in where it said "Insert  
10 keywords," now you are referring to the Dreamweaver software  
11 or Notepad?

12 A. Whatever template I was using.

13 Q. Okay. So there would be a template, and there would be  
14 some section that says "keywords"?

15 A. Exactly, yes.

16 Q. And that's where you would enter the information that  
17 shows up in lines 3 through 5?

18 A. Yes.

19 Q. Okay. And the other websites that you created for this  
20 multilevel marketing that you just mentioned, I think  
21 getrich --

22 A. -- smoking.

23 Q. Okay. And there was one other.

24 A. steamnicotine.

25 Q. Okay. Did you create those websites?

1 A. I can't remember. My wife used Wix or some other program  
2 to create one or two of them. I don't remember -- I know I  
3 did get rich smoking and inhale inside for sure.

4 Q. And you referenced "Wix." Is that a similar program as  
5 Dreamweaver?

6 A. No, it is even easier. It is you just go on the website,  
7 and it literally creates it for you without doing anything.

8 Q. Okay. You are aware that at some point on or about  
9 September 28th, 2011 -- between September 28th, 2011, I  
10 believe, and like October, early October 2011, 21st Century  
11 Smoke appeared in some of the metadata of your website?

12 You are aware that's one of the issues in this case?

13 A. Yes, of course.

14 Q. Is what -- do you know if -- how -- well, strike that.

15 THE COURT: No, that's a fine question. How did it  
16 get there? That's what everybody wants to know.

17 MR. SALAM: Well, it is what came after is what I was  
18 trying to ask.

19 THE COURT: Okay. Go ahead.

20 BY MR. SALAM:

21 Q. With what you know from having put the meta -- the  
22 keywords in Exhibit 75, would you have been able -- from what  
23 you know, in doing, creating Plaintiff's Exhibit 74 and the  
24 coding in Plaintiff's Exhibit 75, would that have allowed you  
25 to place 21st Century Smoke in the metadata in your

1 web -- when I say "your," in 21 Century Smoking's website in  
2 2011?

3 A. No.

4 Q. Why not?

5 A. Because you can't just go onto the main file and change  
6 the keywords. There is some type of override feature that  
7 doesn't allow you to change keywords, and then the back-end  
8 admin panel where it says "Enter keywords here," where it  
9 should be -- any dummy should be able to do it, it doesn't  
10 work. So you can't actually change the keywords without some  
11 type of -- I don't even know. I don't know how you change the  
12 keywords.

13 Q. I would like to direct your attention briefly to  
14 Plaintiff's Exhibit 76, and I will give you a moment if you  
15 can look at all of Plaintiff's Exhibit 76.

16 Well, let's walk through it for a second.

17 The first page is an e-mail, correct?

18 A. Correct.

19 Q. And it has -- under "Attachments," can you read what that  
20 says?

21 A. "brianindex.html" and "cleaning.html."

22 Q. And that's an e-mail from you to --

23 A. Myself.

24 Q. Okay. And the subject is?

25 A. "Cleaning website."

1 Q. All right. If you go to the next page, and, actually, I  
2 will ask you to briefly look at the pages of content prior to  
3 hitting HTML code. I just want you to have a chance to review  
4 that.

5 Do you know what that is?

6 A. It looks like the cleaning -- or the cleaning e-book that  
7 Bryan was trying to create.

8 Q. When you say "Bryan," which Bryan are you -- who are you  
9 referring to?

10 A. Bryan Kos. Bryan Scott Kos.

11 Q. And at this time -- okay, Bryan Scott Kos.

12 And did you create this -- did you create this  
13 content?

14 A. No.

15 Q. Who created this content?

16 A. Bryan.

17 Q. Okay. Did you put this content into a website?

18 A. I don't believe it ever went live. So, no, not in a  
19 website.

20 Q. Okay. Did you -- well, if you now turn to -- do you see  
21 the first page of coding? If you keep flipping through, the  
22 first place that there is -- at line 1, it says "html" between  
23 brackets?

24 A. Yes.

25 Q. And let me make the record a little cleaner here for a

1 second. Let me count the pages.

2 All right. I'm referring you to the fourth page of  
3 Plaintiff's Exhibit 75.

4 A. 76, right?

5 Q. I'm sorry. 76.

6 THE COURT: We are on Exhibit 76.

7 MR. SALAM: 76, I apologize.

8 THE COURT: That's okay.

9 BY MR. SALAM:

10 Q. Did you write this source code?

11 A. Yes.

12 Q. You, personally?

13 A. Well, no, I didn't write the source code, but I'm the one  
14 who entered in the times.

15 Q. Okay.

16 A. Sorry, I did not write the entire source code.

17 Q. Okay. Where did you get the first three pages of  
18 Exhibit 76 -- I'm sorry -- the pages 452 through -- the first  
19 page is an e-mail, correct?

20 A. Yes.

21 Q. Okay. And the next page has text content, correct?

22 A. Yes.

23 Q. Okay. And do you see at the top -- what's the top line  
24 there?

25 Could you read that?

1 A. "Brian (003).html".

2 Q. I'm sorry. The second page of Exhibit 76.

3 A. Oh, sorry.

4 "Great MLM Opportunity with the Best Electronic  
5 Cigarette, Living the inLife."

6 Q. Do you have an understanding as to why that appears on  
7 this document?

8 A. Because I was just taking, literally, the content he put  
9 and just putting it on the electronic cigarette website.

10 Q. And you say on the website or in a template?

11 A. And just whatever the template that I used for the  
12 electronic cigarettes, I just plopped whatever he wrote on the  
13 exact same template.

14 Q. Okay. And then I would like to direct your attention to  
15 Page 5 of Exhibit 76 that has the first page of the coding.

16 A. Yes.

17 Q. Okay. And at the top, in line 3, it says: <Meta  
18 name="Author".

19 Do you see that?

20 A. Yes.

21 Q. Do you see that?

22 A. Yes.

23 Q. And who is listed?

24 A. Brent Duke.

25 Q. Okay. And you see it says "keywords"?



1 A. Yes.

2 Q. And it says "keywords" and it says "content=".

3 Can you read what it says there?

4 A. "E-cigarette, e-cig, electronic, cigarette, myinlife,  
5 inLife, revelle, elite, prestige, nicotine, smoking."

6 Q. Okay. And I would refer you back to Plaintiff's  
7 Exhibit 75.

8 And you see at the top lines 3 through 5?

9 A. Yes.

10 Q. Those are the same in both Exhibit 75 and Page 5 of  
11 Exhibit 76, correct?

12 A. Yes.

13 Q. Why is that, if you know?

14 A. Because I had literally just taken it and cut and paste a  
15 bunch of text over the Inhale Inside website that I already  
16 had.

17 Q. Okay. I would like to direct your attention to  
18 Plaintiff's Exhibit 31 and Plaintiff's Exhibit 32.

19 Can you tell me what Plaintiff's -- what information  
20 is contained in Plaintiff's Exhibit 31?

21 A. Sales by store, by month for 2010 and 2011, 2012, and the  
22 beginning of 2013.

23 Q. Okay. And is there any online sales information in  
24 Exhibit 31?

25 A. No.

1 Q. I would like to direct your attention to Exhibit 32, and  
2 to the third page, which is Bates-numbered, for the record,  
3 21C 1005535, and I would like to direct your attention to the  
4 last page of that exhibit, 21C 1005558.

5 The pages from 21C 1005535, where at the top it says  
6 "Pacific View Mall," to the last page of this exhibit, which  
7 references Beachwood Place Mall, would I be correct, this is  
8 sales information for your stores, correct?

9 A. Correct.

10 Q. Okay. And the sales information for your stores in these  
11 two exhibits is the same, correct?

12 A. Correct.

13 Q. So the only difference between Exhibit 31 and Exhibit 2  
14 [sic] is the first page -- I'm sorry, Page 2, that talks about  
15 online sales, correct?

16 A. Correct.

17 Q. All right. Now -- strike that.

18 Do you recall at some point in this case whether or  
19 not your attorneys asked you for sales information?

20 A. Yes, on multiple occasions.

21 Q. And when was the first time they asked you for sales  
22 information?

23 A. Pretty early on. I don't recall exactly.

24 Q. Okay. Just some background here. I want to try and place  
25 timing.

1           According to the docket, I believe this complaint was  
2   filed on September 7th, 2012, so accept that for purposes of  
3   this question.

4           And, as well, Mr. Leavens, the record indicates,  
5   filed his appearance on October 3rd, 2012.

6           Do you -- does that refresh your recollection as to  
7   when your attorneys might have first asked you for sales  
8   information?

9   A.   Yes, probably late 2012, they would have been asking me  
10   for sales figures.

11   Q.   Did you have an understanding of why they were asking you  
12   for sales information at that time?

13   A.   Because we were showing first use of the name. So we had  
14   to look for sales information, proving that there were sales  
15   in 2009, 2010, prior to the other side using the name.

16   Q.   Did they ask you for information by state or geographic  
17   area?

18   A.   At some point, yes.

19   Q.   Do you recall if, at some point, your former defense  
20   counsel asked you for sales information to provide to  
21   the -- to your experts?

22   A.   Yes.

23   Q.   Do you recall when that was?

24   A.   I do not.

25   Q.   Okay. Did you provide your attorneys sales information

1 for the experts?

2 A. Yes.

3 Q. What information -- if you recall, what information did  
4 you provide?

5 A. I don't recall exactly. Whatever they asked for.  
6 Whatever they asked for, I provided.

7 Q. Do you recall if you provided your tax returns?

8 A. If they asked for them, yes. I do not recall.

9 Q. Do you recall if you would have provided them the second  
10 page of Exhibit 32, Plaintiff's Exhibit 32?

11 A. No, I would not have.

12 Q. Why not?

13 A. Because it is incomplete sales data. My wife keeps track  
14 of literal sales that she sends out, and she keeps track of  
15 the store-by-store sales she was doing at this time. So this  
16 is kind of her spreadsheet that she would work with. So if an  
17 order came in online, and she processed it, she would kind of  
18 track it herself. It didn't track any of the online sales  
19 that I assisted with over the phone or over the computer. So  
20 it leaves out 80, 90 percent of our online sales. So, no,  
21 there would be no reason to present this to someone. It is  
22 only a partial sales record.

23 Q. And how does a customer of yours, if they were going  
24 through your website, as opposed to a store, pay to purchase  
25 product?

1 A. Right now, they would use a company called  
2 "Authorize.Net," and at this point in time, they would have  
3 used a company called "BluePay."

4 Q. Do you know if any BluePay records were provided to your  
5 attorneys?

6 A. Oh, I'm sorry, on PayPal. On PayPal in the very  
7 beginning, and then BluePay, and now Authorize.Net.

8 Q. Okay. And do you know if any of those records were  
9 provided to your attorneys?

10 Strike that. Let me ask a different question.

11 You provided the online sales information to your  
12 attorneys, correct?

13 A. Yes.

14 Q. And you decided what information -- what online sales  
15 information to provide to them, correct?

16 A. Oh, yes, the total information.

17 Q. Okay. And where did you collect that information?

18 A. I would have used something like my wife's spreadsheet. I  
19 would have used my records on my computer. I would have used  
20 BluePay because BluePay actually does track sales.

21 So I would use BluePay. I would use PayPal, if it  
22 was the time of PayPal. It just depends on what we were using  
23 to process, but I would compile the data from the different  
24 sources that were necessary.

25 Q. Okay. And did you provide those compilations to your

1 attorneys?

2 A. Yes.

3 Q. Are you aware of whether or not they provided those  
4 compilations to your experts?

5 A. I would expect so, yes.

6 Q. Are you aware of whether or not they provided that  
7 information to Plaintiff's counsel?

8 A. My sales data?

9 Q. I'm just asking if you are aware.

10 A. I don't know. I don't know.

11 THE COURT: Tell me when you are at a good place to  
12 pause. Just keep going, but when you are at a transition, let  
13 me know.

14 MR. SALAM: Let me check to see if I have anything  
15 else on this.

16 I'm finished as to this exhibit, your Honor, if you  
17 have a question.

18 THE COURT: Okay. Briefly.

19 We were talking about 31 and 32. 32, the very first  
20 page, at the title, it says "lawsuit-monthly sales including  
21 online," and then attached to that e-mail are sales, as you  
22 mentioned, by store, by month, 2010 through 2013, right?

23 THE WITNESS: Correct, your Honor.

24 THE COURT: And it also has online sales, 2009, 2010,  
25 '11, and '12, and then for January of '13, right?

1           THE WITNESS: Correct, your Honor.

2           THE COURT: And so was 32 and the entirety of 32  
3 provided to your attorneys, or just everything starting with  
4 Pacific View Mall, which is 21C 1005535?

5           My point -- my question is: The first page with  
6 online sales, was that provided to your attorneys back in  
7 2012?

8           THE WITNESS: I don't know why it would have been,  
9 your Honor. It is not the total sales number. So I would  
10 have supplemented this with the additional online sales that  
11 we had before presenting it to my attorneys.

12          THE COURT: All right. If you know, why would your  
13 wife have sent you an e-mail that says "lawsuit-monthly sales  
14 including online," and then have a separate page that says  
15 "online sales" from 2009 through the beginning of 2013 if it  
16 was not going to be used for the lawsuit?

17          THE WITNESS: Where are you seeing that title, your  
18 Honor?

19          THE COURT: Right on the first page, "lawsuit-monthly  
20 sales including online." She must have thought it was  
21 important.

22          THE WITNESS: I mean, is this the title of the  
23 e-mail? I'm just confused.

24          THE COURT: Yep.

25          THE WITNESS: Okay.

1 THE COURT: I don't know. Look, I didn't type it.

2 I'm just reading it, and it is in two places. It  
3 says "lawsuit-monthly sales including online," and below that,  
4 in bold, it says "lawsuit-monthly sales including online."

5 THE WITNESS: Because I would have requested from her  
6 the online sales that she did, and then all of the store  
7 sales, and then I would have taken the online sales that I  
8 did, supplemented her numbers, to get the total online sales  
9 figures.

10 So the store figures are correct because she entered  
11 those every day on her own. So I would need those from her.  
12 The online sales, she couldn't finish this document without my  
13 help. So she gave what she had. I supplemented it with what  
14 I had.

15 THE COURT: Okay. So is there a document for online  
16 sales between 2009 and the beginning of 2013 that has both  
17 your wife's information and your information out there?

18 THE WITNESS: Any BluePay spreadsheet would contain  
19 all of the sales that went through the BluePay program. So I  
20 have many spreadsheets that have the total numbers of sales  
21 that were transacted through online, yes.

22 THE COURT: Okay. Were those provided to your  
23 attorneys?

24 THE WITNESS: The final figures were. I don't know  
25 if the spreadsheets I used to get to the final figures were.



1           THE COURT: Were they broken out between online sales  
2   and store sales?

3           THE WITNESS: Yes, yes, the store sales wouldn't  
4   include BluePay because we didn't use BluePay for store sales.  
5   So BluePay would still only be the online sales record.

6           THE COURT: Okay. All right. Go ahead.

7   BY MR. SALAM:

8   Q. Just staying on this topic for a second, you said you  
9   prepared spreadsheets and put together the numbers, correct?

10   A. Yes.

11   Q. Okay. Where would those documents -- where did you keep  
12   those? Where would those spreadsheets be?

13   A. On my computer.

14   Q. And those were the computers that were imaged by  
15   4Discovery?

16   A. Correct.

17   Q. Okay. So if those computers were -- had the 20 search  
18   terms that you never saw, if the 20 search terms had been run  
19   against -- strike that.

20           They were on the computers that you understand were  
21   imaged, correct?

22   A. Correct.

23   (Brief pause.)

24           THE COURT: And while he is talking to co-counsel, so  
25   31 and 30, I understand the distinction between the two

1 documents.

2 My question is this: Sales information that was  
3 provided to your attorneys, was it the same sales information  
4 that was provided to your expert?

5 THE WITNESS: Yes.

6 THE COURT: Okay. All right. Go ahead.

7 BY MR. SALAM:

8 Q. To be clear, did you provide your lawyers with  
9 accurate -- when your lawyers asked you for sales information,  
10 they were looking for totals, correct?

11 A. Correct.

12 Q. And did you provide them accurate sales information?

13 A. Absolutely, yes.

14 Q. I would like to direct your attention to LS  
15 Exhibit No. 18, and it is going to come up on the screen.

16 MR. SALAM: We are going to go old style.

17 18, Ms. Rich.

18 BY MR. SALAM:

19 Q. I'm going to hand you what is marked as LS Exhibit 18 and  
20 ask you to take a look at that.

21 And you recall being asked questions about this  
22 earlier today, correct?

23 A. Yes.

24 Q. And you testified -- or this e-mail, as you read into the  
25 record, says: "See Brent's response below. There is no

1 second recording."

2 Do you recall seeing that?

3 A. Yes.

4 Q. And you testified that you never sent a second recording  
5 to your lawyers, correct?

6 A. Correct.

7 Q. But you did say you -- strike that.

8 I would like to direct your attention to Plaintiff's  
9 Exhibit 23. I believe this has been admitted into evidence,  
10 but you received this e-mail from Mr. Edmiston on or about  
11 October 2nd, 2013?

12 A. Correct.

13 Q. And can you, again, read for the record what it says?

14 A. "S. Video too long to send, but I have it."

15 Q. And you received this on or about that date, correct?

16 A. Correct.

17 Q. You did not forward it to your attorneys, correct?

18 A. Correct.

19 Q. And at the time you received this, was your -- I'm trying  
20 to recall your testimony, and I think it was from day one,  
21 that you said you didn't realize that the movie -- what we are  
22 calling "a movie" -- the recording was attached?

23 A. Correct.

24 Q. Why not?

25 A. Because it literally says in the text that it's too long

1 to send, so I didn't even think to look down below and see if  
2 he sent it. It says "too long to send." I don't interpret  
3 that to mean check for attachments. I interpret that to mean:  
4 I'm going to try to figure out another way to get it to you.

5 Q. Okay. All right. But you would agree on this that,  
6 according to this e-mail, it does appear, and nobody -- I  
7 don't believe anybody is disputing it, that this recording  
8 designated IMG\_0118.MOV was, in fact, attached?

9 A. It definitely was, yes.

10 Q. How did you miss that?

11 A. Because, as I stated previously, every e-mail he sends has  
12 attachments, so I don't check all of his e-mails down below  
13 for attachments because it would be a waste of time if they  
14 all have attachments, and this one says, literally, this thing  
15 is too long to send, I'm going to have to find another way to  
16 send it, is what I'm interpreting this as. So I didn't go  
17 look down below to see if there was an attachment.

18 Q. And then just briefly, referring back to LS Exhibit 18,  
19 when you told your attorneys that there was not a second  
20 video -- or, I'm sorry, a second recording, at the time you  
21 told them that, you truly -- you believed you were correct?

22 A. Yes, I did believe I was correct.

23 Q. I would like to direct your attention to Plaintiff's  
24 Exhibit 66.

25 And for the record, this is Docket No. 318,

1 "Defendants' Status Report Pursuant to this Court's June 6,  
2 2019 Order."

3 You have seen this before, correct?

4 A. Correct.

5 Q. And you have reviewed this, correct?

6 A. Yes.

7 Q. I'm going to be asking you a series of questions related  
8 to the information contained in here.

9 And I would direct your attention to Page 4, the  
10 first bullet point.

11 Who is Brandon Duke?

12 A. My brother.

13 Q. All right. And the information contained under bullet  
14 point -- this first bullet point with respect to Mr. Duke,  
15 could you please review that and tell me if you believe it's  
16 accurate?

17 THE COURT: What page are we on?

18 MR. SALAM: Page 4.

19 THE COURT: Okay. Thank you.

20 THE WITNESS: Yes, it was accurate at this time -- or  
21 accurate up to date.

22 BY MR. SALAM:

23 Q. The second bullet point --

24 A. I'm sorry. I don't understand the question.

25 Are you asking if it is accurate now or is it

1 accurate then?

2 Q. Well, this was filed -- let's see, this was filed on  
3 August 13th, 2019. Mr. Duke is your -- or Brandon Duke is  
4 your brother, correct?

5 A. Yes.

6 Q. And it is your understanding that his employment ended on  
7 or about September 5th, 2014?

8 A. Correct, yes.

9 Q. And that he managed/co-owned kiosks?

10 A. Yes.

11 Q. So what I mean by it is do you see anything in there that,  
12 as you sit here today, you believe is not correct?

13 A. Just that last sentence, I would question. I believe he  
14 has responded.

15 Q. Oh, okay. I understand what you are saying, yes.

16 This was -- as of this date, he had not responded?

17 A. Correct.

18 Q. Okay. So, yes, the information as of this date. I  
19 apologize.

20 A. Okay.

21 Q. Because I am aware that other things have occurred with  
22 respect to investigating electronically searched --

23 A. Yes.

24 Q. Let me finish.

25 It is your understanding that additional efforts have

1    been made since this report, correct?

2    A.   Yes, of course.

3    Q.   With respect to recovering electronically searchable  
4    information?

5    A.   Yes.

6    Q.   Okay.  So certain people that might be -- it says in here  
7    might not have been contacted as of this date may have been  
8    contacted subsequently, correct?

9    A.   Yes.

10   Q.   Okay.  And the people doing that contacting would not be  
11   you, correct?

12   A.   Correct.

13   Q.   And who do you understand is doing that?

14   A.   My current lawyers.

15   Q.   Thank you.

16               The third bullet point with Bryan Kos, can you take a  
17   look at that and tell me, other than he has not yet been  
18   interviewed, which you may or may not know, is the other  
19   information in there correct to the best of your knowledge?

20   A.   Yes.

21   Q.   The fourth bullet point, Krenar Koleci, same question.

22   A.   Yes.

23   Q.   With respect to Mr. Hough, the next bullet point -- let  
24   me -- except for the last sentence, since I'm going to assume  
25   you have no independent knowledge of what Mr. Hough discussed

1 with -- well, let me ask: Do you have any independent  
2 knowledge of what Mr. Hough discussed with Mr. Byrne?

3 A. No.

4 Q. Well, let's walk through this.

5 Mr. Hough -- it says: "Mr. Hough" -- I'm reading  
6 from the second line.

7 "Mr. Hough performed telephonic customer service  
8 duties, web development, and IT services"; is that correct?

9 A. Yes.

10 Q. And it says: "Mr. Hough originally worked at a kiosk in  
11 the Old Orchard Mall (Skokie, Illinois), thereafter, briefly  
12 in 21 Century's store in Chicago, and then at the company's  
13 warehouse in Chicago"; is that correct?

14 A. Yes.

15 Q. Okay. Rob Link, other than when or how he was contacted  
16 by Defendants' counsel, is that information correct to the  
17 best of your knowledge?

18 A. Yes.

19 Q. With respect to Steve Spraker, is it correct that his  
20 employment ended on or about May 9th, 2014?

21 A. Yes.

22 Q. And that he co-owned 21 Century's Chicago store?

23 A. Yes.

24 Q. And that he also co-owned and assisted in managing kiosks  
25 in Ohio?



1 A. Yes.

2 Q. Are you aware of whether or not current defense counsel  
3 was able to contact Mr. Spraker since this -- since  
4 August 9th -- I'm sorry, since August 13th, 2019?

5 A. I believe they have, yes.

6 Q. Directing your attention to Page 6, under -- there is a  
7 paragraph or a title "D. Nonemployee."

8 Do you see that section?

9 A. Yes.

10 Q. And below that, can you read the sentence?

11 It says: "Jason" -- how do you pronounce that?

12 A. Jason Kois.

13 Q. K-o-i-s --

14 A. Yes.

15 Q. -- for the court reporter.

16 And it references an e-mail account,  
17 jason@21centurysmoking.com?

18 A. Correct.

19 Q. Okay. And then if you can read the next two sentences out  
20 loud.

21 A. "Jason Kois and Peter Kois were customers of 21 Century  
22 who decided to open their own store. Mr. Duke had extra free  
23 e-mail addresses through GoDaddy and provided one to Jason  
24 Kois."

25 Q. Is that correct?

1 A. Correct.

2 Q. Okay. Let's move down to the next section, the e-mail  
3 accounts.

4 The first one there, brentstantonduke -- all one  
5 word, for the court reporter -- brentstantonduke@gmail.com, is  
6 that your e-mail address?

7 A. Yes.

8 Q. What do you use that -- well, have you ever used it  
9 before?

10 A. Yes.

11 Q. Have you ever used it with respect to  
12 21centurysmoking.com?

13 A. I'm not sure.

14 Q. To the extent that e-mail has been downloaded by your  
15 current e-discovery providers, you would be able to determine  
16 if you used it for 21centurysmoking.com by reviewing those,  
17 correct?

18 A. Correct.

19 Q. As you sit here today, do you -- what is your expectation  
20 as to whether or not you used -- if you have one, as to  
21 whether or not you used that for 21centurysmoking.com?

22 A. There wouldn't be very much --

23 MR. DAVIS: Objection, calls for looking into a  
24 crystal ball.

25 THE COURT: Do you know if it was used?

1           THE WITNESS: I didn't -- if I used it at all, it  
2 would be very rare. I mean, I know that for a fact.

3 BY MR. SALAM:

4 Q. Did you reasonably believe that that e-mail address would  
5 not have any e-mails related to 21centurysmoking.com?

6 MR. DAVIS: Objection, foundation.

7 THE COURT: Yes, why don't you ask a different  
8 question.

9 Sustained.

10 BY MR. SALAM:

11 Q. When your lawyers asked you to search for e-mails, what  
12 accounts did you search?

13 A. bduke@21centurysmoking.com, support@21centurysmoking.com,  
14 and brentduke@yahoo.com.

15 Q. Did you search any other e-mails when your former defense  
16 counsel would ask you to find information?

17 A. No.

18 MR. DAVIS: Objection, vague.

19 THE COURT: Overruled.

20 THE WITNESS: Those are the three I searched.

21 BY MR. SALAM:

22 Q. And why did you only search those three?

23 A. Because those are the ones I used.

24 Q. I'm sorry?

25 A. Because those are the ones I used.

1 Q. Used for what?

2 A. Business, for 21 Century Smoking business.

3 Q. So when they asked you to search for e-mails, you searched  
4 all the e-mail accounts that you understood or expected to  
5 have responsive information to what your lawyers were asking  
6 for?

7 A. Correct.

8 MR. DAVIS: Objection, foundation.

9 THE COURT: Overruled.

10 THE WITNESS: Correct.

11 BY MR. SALAM:

12 Q. The second e-mail on there, duke.laurie@gmail.com, whose  
13 e-mail account is that?

14 A. My wife.

15 Q. Do you know what she used that e-mail account for?

16 A. I do not know.

17 Q. Do you know if she used it for 21centurysmoking.com  
18 business?

19 A. I can't imagine she would have, but I don't know what she  
20 uses her e-mail for.

21 Q. When you say that you can't imagine that she would have,  
22 what's the basis for that?

23 A. She doesn't really e-mail anyone. I mean, she handles  
24 support@21centurysmoking e-mails, but she doesn't really do a  
25 lot of outside e-mailing.

1 Q. So when she was doing work related to  
2 21centurysmoking.com, what e-mail accounts are you aware that  
3 she used?

4 A. support@21centurysmoking.com.

5 Q. Are you aware of any others that she used?

6 A. She has a laurie@21centurysmoking.com. I think it is like  
7 on her business card, but I don't know if she has ever  
8 actually used it.

9 Q. The third e-mail on there, again, it says "Service,  
10 Gmail," and the e-mail account is 21 spelled out, so  
11 twentyonecenturysmoking@gmail.com.

12 Do you see that?

13 A. Yes.

14 Q. What e-mail account is that, if you know?

15 A. I don't even remember.

16 Q. At the time your attorneys were asking you to search for  
17 information, did you -- were you aware of this account?

18 A. I'm not sure exactly what it is, so I would never have  
19 looked at it for anything I was doing. I have never logged in  
20 to it. I'm not sure what it is.

21 Q. You've never used it?

22 A. No.

23 Q. The next one at GoDaddy, that's  
24 bduke@21centurysmoking.com, that's the same one we have been  
25 discussing repeatedly, correct?

1 A. Correct.

2 Q. Okay. The next one, bduke@evtcigs -- I'm sorry, let  
3 me -- and I apologize to the court reporter. I know I'm  
4 talking fast. I will try to slow down.

5 The next e-mail, bduke@evtcigs.com, can you tell me  
6 what that e-mail account is?

7 A. It's an e-mail account created in 2015 or 2016, I believe.

8 Q. By you?

9 A. Yes.

10 Q. And what for?

11 A. My friend and I were trying to develop a different  
12 technology for electronic cigarettes.

13 Q. Is that related to your business at 21centurysmoking.com?

14 A. No.

15 Q. The next e-mail, bduke@farmers -- I'm  
16 sorry -- bduke@farmersolution.com, can you tell me what that  
17 e-mail account is?

18 A. It was an e-mail account for the domain  
19 farmersolution.com.

20 Q. And is that e-mail account related to your business at  
21 21centurysmoking.com?

22 A. No.

23 Q. The next e-mail, brandon@21centurysmoking.com, what e-mail  
24 is that?

25 A. My brother's 21 Century Smoking e-mail.

1 Q. Do you know if he used that for 21 Century Smoking  
2 business?

3 A. Possibly. I'm not sure.

4 Q. The next e-mail, bryan@21centurysmoking.com, whose e-mail  
5 account is that?

6 A. Bryan Kos.

7 Q. Do you know if he used that for 21centurysmoking.com  
8 business?

9 A. I believe that he did.

10 Q. froggieandjim@21centurysmoking.com, do you know what that  
11 e-mail is?

12 A. It's Sharon Brady, I think, and James Shimp. It was the  
13 two of them were -- I believe they are married now, but they  
14 were together, and they were helping manage our kiosks in  
15 Ohio.

16 Q. And is that the Jim Shimp from the bullet point on Page 4?

17 A. Yes.

18 Q. And it says here that he managed stores in Ohio,  
19 yet -- this Froggie, that's his now wife?

20 A. Correct.

21 Q. Okay. Was she an employee of 21 Century Smoking, if you  
22 know?

23 A. I know she helped him out. I can't remember if she ever  
24 actually worked for us. I know she did help him out though.

25 Q. info@automaticcigarettes.com, what e-mail -- what can you

1 tell me about that e-mail account?

2 A. It's for the website automaticcigarettes.com. It was the  
3 info e-mail from that website.

4 Q. And does that website have anything to do with  
5 21centurysmoking.com?

6 A. No.

7 Q. jason@21centurysmoking.com, can you tell me about that  
8 e-mail account?

9 A. That's the one from above for Jason and Peter Kois, who  
10 opened the store in, I believe, Joliet or somewhere in that  
11 area.

12 Q. And the krenar@21centurysmoking.com?

13 A. He was a wholesaler somewhere in New England.

14 Q. And that's the Krenar Koleci bullet point from Page 4?

15 A. Correct.

16 Q. laurie@21centurysmoking.com?

17 A. That's my wife.

18 Q. And do you know if she used that e-mail account for  
19 business?

20 A. As I stated, I can't remember her ever using it. She may  
21 have used it. I don't know.

22 Q. rob@21centurysmoking.com.

23 A. That would be -- I think that one is Rob Link.

24 Q. And do you know if he used that for business, for  
25 21centurysmoking.com business?



1 A. He may have a little bit.

2 Q. robert@21centurysmoking.com?

3 A. That would be Robert Hough.

4 Q. Excuse me?

5 A. That would be Robert Hough.

6 One of those is Rob Hough, one of those is Rob Link.

7 I think the "Robert" is Rob Hough.

8 Q. Okay. sales@21centurysmoking.com, can you tell me about  
9 that e-mail account?

10 A. At this moment, I cannot recall exactly who that is.

11 Q. But that's different than support@21centurysmoking.com,  
12 correct?

13 A. Correct.

14 Q. spraker@21centurysmoking.com?

15 A. That would be Steve Spraker.

16 Q. And I think your testimony was you are not sure whether he  
17 used that for 21 Century Smoking business?

18 A. Yes, he may have used it a little bit, but I don't think  
19 that was primarily what he used.

20 Q. And was it your testimony that he was the one who  
21 explained to you or you talked to that led you to forwarding  
22 certain e-mails to your other account?

23 A. Yes.

24 Q. support@sportsdoctrine.com, what is that e-mail account?

25 A. It was for that website that Kirti built called Sports

1 Doctrine.

2 Q. Going to the next page, Page 7, top,

3 support@wholesaleelectroniccigarettes.com, what can you tell  
4 me about that e-mail account?

5 A. It was a web page set up to be able to do general  
6 wholesale.

7 Q. And did that involve 21centurysmoking.com business?

8 A. I don't know if we ever actually did any business at that  
9 website, but it would have been listed on there, yes.

10 Q. Okay. So that was set up -- or you were trying to -- what  
11 was the purpose of setting up that e-mail?

12 A. To integrate the wholesale function between Automatic  
13 Cigarettes and 21 Century Smoking.

14 Q. Okay. test@21centurysmokes.com, can you tell me about  
15 that e-mail address?

16 A. I don't think it has ever been used.

17 Q. Excuse me?

18 A. I don't think that has ever been used.

19 Q. But it is an e-mail account that you set up on GoDaddy,  
20 correct?

21 A. Correct.

22 Q. Do you recall why you set that up?

23 A. I do not.

24 Q. The next one, test@21centurysmoking.com?

25 A. Yes, I don't know. I have no idea why that was created.

1 Q. But you did create it?

2 A. Either myself or Rob Hough, yes.

3 Q. And wholesale@automaticcigarettes.com, what can you tell  
4 me about that e-mail account?

5 A. That probably would have been used -- or I guess that  
6 would have been used for any wholesale customers for the  
7 Automatic Cigarettes website.

8 Q. And you had testified the Automatic Cigarettes website was  
9 unrelated to 21centurysmoking.com?

10 A. Correct.

11 Q. All right. The next one is brentduke@yahoo.com, which we  
12 have heard about, correct?

13 A. Correct.

14 Q. And it is your understanding that at some point 4Discovery  
15 did download that, correct?

16 A. Yes.

17 Q. And it is your understanding that, at some point, the 20  
18 search terms that you had not seen were run against that,  
19 correct?

20 A. Yes.

21 Q. Okay. Moving on with the Yahoo! accounts here -- it is  
22 spelled out, not by numbers --  
23 twentyonecenturysmoking@yahoo.com, what can you tell me about  
24 that account?

25 A. I think that was one of the accounts we created to do

1 Craigslist ads.

2 Q. And can you explain to me why you would create that  
3 account and what you -- strike that.

4 MR. SALAM: Can I have his last answer read back,  
5 please?

6 (Record read.)

7 BY MR. SALAM:

8 Q. Can you explain how you used that account with Craigslist?

9 A. Because when you go on Craigslist, you have to have an  
10 e-mail address. So we created a few different e-mail  
11 addresses for a few different geographical locations  
12 throughout the United States.

13 Q. And what were you -- Craigslist is the place you sell  
14 product or can sell product?

15 A. Yes, try to get people to go to the website to sell  
16 product, yes.

17 Q. So explain to me how this e-mail would be used with  
18 respect to trying to sell product on Craigslist.

19 A. Well, I mean, when you put an ad on Craigslist, you have  
20 to have an e-mail address, and then you confirm it through the  
21 e-mail address, and then the ad goes live.

22 Q. So you needed an e-mail address that Craigslist could use  
23 to confirm. When you said -- explain to me who or what's  
24 being confirmed.

25 A. The ad.

1 Q. Excuse me?

2 A. The ad itself and your e-mail address being accurate.

3 Q. So when you place an ad on Craigslist, they need to have  
4 an e-mail address to contact you to confirm that you are the  
5 person placing the ad?

6 A. Yes.

7 Q. Okay. So what e-mails would -- what would you understand  
8 to be the e-mails that would be in such e-mail account that  
9 you used for Craigslist?

10 A. It would have just been the link from Craigslist saying,  
11 "Is this your ad," and then you click on it, or something like  
12 "Click on this to make ad live" kind of thing. So you just  
13 click on that, just to confirm that it is a real person and  
14 not some fake e-mail address.

15 Q. Okay. So when you said you created certain e-mail  
16 accounts for Craigslist, that's what you are referring to?

17 A. Yes.

18 Q. The next one, brentlaurieduke@yahoo.com, what can you tell  
19 me about that e-mail account?

20 A. Same thing.

21 Q. When you say "same thing," you mean it was--

22 A. The same thing as the twentyonecenturysmoking@yahoo.com.

23 Q. So it was created for -- so you could -- so when  
24 Craigslist wanted to confirm the placement of an ad that it  
25 would come to that e-mail account?

1 A. Correct.

2 Q. And why did you need multiple e-mail accounts to do that?

3 Why couldn't you just put up lots of Craigslist ads  
4 and only use one e-mail account?

5 A. Because it would be easier for us to track if one e-mail  
6 account was for, say, Chicago, and one e-mail account was for  
7 Ventura, or one e-mail account for Atlanta. If we could have  
8 one e-mail account located with each area, it made it easier  
9 to keep track of.

10 Q. The bsdatsu@yahoo.com, what can you tell me about that  
11 account?

12 A. I believe same thing.

13 Q. And by "same thing," you mean related to Craigslist?

14 A. Yes.

15 Q. laurienomanson@yahoo.com, what can you tell me about that  
16 e-mail account?

17 A. My wife's old e-mail address. That's her maiden name.

18 Q. And when did you and Laurie get married?

19 A. 20 --

20 THE COURT: You can't think that long.

21 THE WITNESS: 2007.

22 She is not here.

23 2007.

24 MR. SALAM: She may read the transcript.

25 2007.

1 BY MR. SALAM:

2 Q. Are you aware if she used that e-mail account for  
3 21centurysmoking.com business?

4 A. It is theoretically possible she would use it for the same  
5 Craigslist type thing, but I can't recall.

6 Q. Okay. But other than that, you are not aware of her using  
7 it for 21centurysmoking.com business, correct?

8 A. No.

9 Q. And laurieduke@ymail.com, what do you know about that?

10 A. Same thing, one of her old e-mail accounts, not sure if  
11 she used that one for the Craigslist ads though.

12 Q. Are you aware of whether or not she used it for  
13 21centurysmoking.com business?

14 A. Only if she would have been using it for Craigslist ads.  
15 Other than that, no.

16 Q. Okay. So the Craigslist ad, you were trying to sell  
17 21centurysmoking.com product, correct?

18 A. Correct.

19 Q. So when you say "We used it for Craigslist," that's how it  
20 was being used with respect to 21centurysmoking.com?

21 A. Correct, and a little bit of that, My inLife as well. So  
22 we were trying to -- that could have been on Craigslist as  
23 well.

24 Q. Okay. So you were also trying to sell the product for  
25 My inLife?

1 A. Simultaneously, yes.

2 Q. Okay. And that's why you created the inhaleinside.com  
3 website?

4 A. Correct.

5 Q. And the couple others you mentioned?

6 A. Correct.

7 Q. Did you ever tell -- did any of your former defense  
8 counsel, prior to May 30th, 2019 -- strike that.

9 When your former defense counsel asked you to find  
10 information, and you would then go search e-mails, I think you  
11 testified you searched your e-mails, correct?

12 A. Correct.

13 Q. And by your e-mails, you mean -- or do you mean the  
14 bduke@yahoo.com, the brent --

15 A. brentduke@yahoo.com.

16 Q. I'm sorry. brentduke@yahoo.com,  
17 bduke@21centurysmoking.com, and support@21centurysmoking.com?

18 A. Correct.

19 Q. And both you and your wife used the  
20 support@21centurysmoking.com, correct?

21 A. Yes.

22 Q. Did other employees use that account?

23 A. Rob Hough, occasionally.

24 Q. And why would he be using that account?

25 A. Because we had him doing response to e-mails.



1 Q. Response to whom?

2 A. Customer e-mails.

3 Q. Okay. So the support@21centurysmoking.com was the main  
4 e-mail you used, the business used, to communicate with  
5 customers, correct?

6 A. Correct.

7 Q. Okay. Now, what other e-mails would you receive at  
8 support@21centurysmoking.com besides e-mails from customers?

9 A. All of like sales data would go there. So online sales  
10 data goes there, the store sales data through the -- they  
11 would send like faxes every day that the fax would turn into a  
12 .pdf and then would come to the e-mail. So all of the sales  
13 data for the company would be in the support e-mail, and then  
14 customer interactions as well.

15 Q. All right. Let me try and unpack that answer for the  
16 record.

17 The sales information from physical stores -- when I  
18 say "physical stores," I'm referring to kiosks or storefronts.

19 I believe you had a store in Chicago that was  
20 actually -- what was the address of your store in Chicago?

21 A. It was like 2516 North Lincoln.

22 Q. Okay. So that would be an actual store you could walk  
23 into off of that address, correct?

24 A. Correct. Yes, we had a few stores.

25 Q. Okay. And by "kiosks," can you describe for the court

1 what you mean by a -- or what you mean by "kiosk"?

2 A. Like a cart that is sitting in a walkway in a mall.

3 Q. All right. Like when you are walking down in the mall,  
4 and they want to spray you with perfume or something, you were  
5 selling -- you had kiosks that were selling your product,  
6 correct?

7 A. Exactly.

8 Q. And so how did you -- how did 21centurysmoking.com track  
9 the sales or keep track of the sales from those physical  
10 locations?

11 A. The employees would -- they had a fax machine in each  
12 location, and the employees would keep track of sales on a  
13 piece of paper, and then they would put it into the fax  
14 machine, which would then fax it, which would go to like eFax  
15 or MyFax or one of those fax services, and it would become a  
16 .pdf, and then would e-mail to support@21centurysmoking.

17 Q. And was that the source of the information Laurie would  
18 keep to -- or track to generate the summary we saw on  
19 Plaintiff's Exhibit 31?

20 A. Correct.

21 Q. And it is your understanding that all e-mails that were  
22 sent to support@21centurysmoking.com would still reside in  
23 that e-mail account that is hosted by GoDaddy, correct?

24 MR. DAVIS: Objection, foundation.

25 MR. SALAM: I asked if it was his understanding.

1 THE COURT: Yes.

2 Do you know?

3 THE WITNESS: Yes, everything should be in there.

4 THE COURT: All right. How do you know?

5 THE WITNESS: Because we haven't deleted any e-mails.

6 BY MR. SALAM:

7 Q. Do you know if any of your employees would have used the  
8 e-mail accounts that they had at 21 Century -- strike that.

9 To the extent some of the e-mail accounts we went  
10 through that end in "@21centurysmoking.com," do you know if  
11 the employees used that to e-mail information or if it would  
12 just be through the fax, if you understand my question?

13 Strike that. Let me try to clean that up a little.

14 A. I can't think of very many of these employees that would  
15 have been working at kiosks. So most of these  
16 21centurysmoking.com e-mails, I can't think that there would  
17 be a lot of faxes that would have been sent or images or any  
18 type of thing that would have sent from these e-mails to  
19 support with sales.

20 Q. Okay. Let me go back to the employees for a second, if  
21 you go back to the bullet points.

22 Brandon Duke, your brother, to the best of your  
23 knowledge, did he have any dealings with Kirti Saraswat?

24 A. No.

25 Q. Did he have any dealings with Mr. Edmiston?

1 A. Yes.

2 Q. Can you describe what those dealings would have been?

3 A. When we met Bill Edmiston at a trade show, my brother was  
4 the one that actually met him in the initial meeting. He was  
5 working the trade show with me.

6 Q. Did Brandon -- did your brother, Brandon Duke, have any  
7 involvement with the trade show at which -- and dealings  
8 with -- strike that.

9 As to the trade show where these recordings were  
10 made -- I direct your attention to that trade show -- was your  
11 brother involved in that trade show?

12 A. No.

13 Q. Was he involved in dealings with Mr. Edmiston related to  
14 that trade show?

15 A. No.

16 Q. Jim Shimp, did Mr. Shimp or his now wife, Sharon, who  
17 apparently -- strike that.

18 Sharon apparently went by the name "Froggie" as well?

19 A. Yes.

20 Q. And she is now his wife?

21 A. Yes.

22 Q. Okay. Did Jim Shimp, to the best of your knowledge, have  
23 any dealings with Kirti Saraswat?

24 MR. DAVIS: Objection, foundation, hearsay.

25 THE COURT: It is a foundational question. See if he

1 knows and how.

2 So overruled.

3 BY MR. SALAM:

4 Q. Do you know if Mr. Shimp had any dealings with Kirti  
5 Saraswat?

6 A. No, she did not deal with him or he did not deal with her.

7 Q. Do you know if Mr. Shimp had any dealings with Bill  
8 Edmiston?

9 A. No.

10 Q. Bryan Kos --

11 A. Or sorry, I do know, and the answer is no.

12 Q. Thank you.

13 Bryan Kos, first, do you know if Mr. Kos had any  
14 dealings with Kirti Saraswat?

15 A. Yes, he did.

16 Q. And I think you answered my next question.

17 So, yes, you know if he did or did not have dealings  
18 with Ms. Saraswat, correct?

19 A. Yes, he did have dealings with her.

20 Q. Okay. And can you tell me what those dealings involved,  
21 or what, if you know -- do you know what his dealings with  
22 Ms. Saraswat related to?

23 A. I met Ms. Saraswat through Bryan in 2008. So he was  
24 looking to make a flyer or something for -- I can't remember  
25 what he was working on at that time, and she was engaged with

1 him in making that flyer, and then wanted me to be the kind of  
2 front person here in the U.S. to meet with Bryan.

3 Q. Okay. And was Bryan Kos going by the name Bryan Kos at  
4 that time in 2008?

5 A. No, I think he was going by Bryan Scott.

6 Q. Okay. Do you have an understanding -- yes or no, do you  
7 have an understanding of why Bryan Kos was going by the name  
8 Bryan Scott in 2008?

9 A. I know he may have legal issues that were going on, that  
10 might have been part of it, but I'm not a hundred percent  
11 sure. I mean, that's his middle name, so I don't know.

12 Q. And what legal issues are you referring to?

13 A. He was currently awaiting going to prison at that time.

14 Q. Krenar Koleci, the next bullet point there on Page 4, do  
15 you know whether or not Mr. Koleci had any dealings with  
16 Ms. Saraswat?

17 A. No, he would not have.

18 Q. He would not have had any dealings with Ms. Saraswat?

19 A. Correct.

20 Q. Do you know if Mr. Koleci would have had any dealings with  
21 Mr. Edmiston?

22 A. He would not have had any dealings with Mr. Edmiston.

23 Q. Robert Hough, do you know if Mr. Hough had any dealings  
24 with Kirti Saraswat?

25 A. I do not believe so.

1 Q. Do you know if Mr. Hough had any dealings with  
2 Mr. Edmiston?

3 A. I don't think so.

4 Q. Robert Link, do you know if Mr. Robert Link had any  
5 dealings with Ms. Saraswat?

6 A. No.

7 Q. Do you know if Mr. Link had any dealings with  
8 Mr. Edmiston?

9 A. No.

10 Q. Steve Spraker, do you know if Steve Spraker had any  
11 dealings with Kirti Saraswat?

12 A. I do not believe so.

13 Q. Do you know if Mr. Spraker had any dealings with  
14 Mr. Edmiston?

15 A. I don't recall any situation where they would have met. I  
16 mean, it is possible Bill might have met me in my store, and  
17 Steve may have been working at the store or something like  
18 that, but that's the only way they could have met that I could  
19 think of.

20 Q. So let me direct your attention to the trade show at which  
21 Mr. Edmiston recorded conversations.

22 Are you aware if Mr. Spraker had any involvement with  
23 Mr. Edmiston and Mr. Edmiston's presence or activity at that  
24 trade show?

25 A. No.

1 Q. I would like to direct your attention to Page 8 of the  
2 status report.

3 As background, and correct me if I'm wrong, but I  
4 believe your testimony on the first day was that you are not  
5 sure which of these eight computers is which, correct?

6 From looking at Page 8, you were not able to tell  
7 exactly which computer was which, correct?

8 A. No. I can get close, but, yes, I can't.

9 Q. The four computers -- it's your understanding that the  
10 four computers that were imaged by 4Discovery are included in  
11 this list, correct?

12 A. Correct.

13 Q. And the four that were not -- you are aware that four of  
14 these computers were not imaged by 4Discovery?

15 A. Correct.

16 Q. What is your understanding as to why they were not imaged?

17 A. Because they were not used for the business.

18 Q. And when you say "the business," you mean  
19 21centurysmoking.com?

20 A. Yes, for 21 Century Smoking.

21 Q. Okay. The phones that are listed, did any of your former  
22 defense counsel ask you to search your phones?

23 A. No.

24 Q. Did any of your former defense counsel ask you if there  
25 was information concerning your business on your phones?



1 A. No.

2 Q. When you were asked to search for information by your  
3 attorneys, did you search your phones?

4 A. No.

5 Q. Why not?

6 A. I cannot think of anything that would have been on my  
7 phones that would have been relative to any of the searches I  
8 was doing. I wasn't saving files on there. If I was checking  
9 an e-mail, that's all on the Web, so it doesn't matter if I'm  
10 doing it from my phone or a computer.

11 Q. If you go to the next page?

12 Under C, social media, I want to ask you a few  
13 questions about that.

14 The Facebook service, the user account is listed as  
15 brentduke@yahoo.com; do you see that?

16 A. Yes.

17 Q. The Facebook page, is that the Facebook page for  
18 21centurysmoking.com?

19 A. Yes. I mean, I have a few pages, but, yes, I believe.

20 Q. Okay. So you have other pages as well?

21 A. I mean, I have a regular Brent Duke page, and then I have  
22 the company page.

23 Q. Okay. You have a personal Facebook page, and then you  
24 have a Facebook page for your business?

25 A. Correct.

1 Q. Okay. And what type of information is on your -- visible  
2 to visitors on your business Facebook page?

3 A. Articles, links to ads -- or not links to ads -- like  
4 promotional stuff, articles, customer posts, things like that.  
5 Standard Facebook page.

6 Q. Does it have a link to your website?

7 A. Yes.

8 Q. And visitors could go buy product -- if they saw your  
9 company -- if they were at your Facebook site or Facebook  
10 page, is there a way they could, if they wanted to, buy  
11 product from your company?

12 A. If they linked to my website.

13 Q. Okay. So if they clicked on a link on your Facebook page,  
14 it would take them to the website, correct?

15 A. Yes.

16 Q. There is a -- let me rephrase that.

17 There is link on your Facebook page that, if clicked  
18 on, would take them to your website, correct?

19 A. Yes. There better be, yes.

20 Q. And so the purpose of your Facebook page was to drive  
21 customers to your website?

22 A. Of course, yes.

23 Q. As well as, I assume, there was other purposes for your  
24 Facebook page, as well, related to your brand, customer  
25 loyalty?

1 A. Yes, like "like us and get a discount" kind of thing.

2 Q. Okay. Could they communicate or e-mail you from your  
3 Facebook page?

4 A. There is a Facebook messaging system, yes.

5 Q. Okay. Did you ever communicate with Ms. Saraswat through  
6 Facebook -- this Facebook chat application?

7 A. Through the 21 Century Smoking Facebook?

8 Q. Yes.

9 A. No.

10 Q. Okay. The Instagram account where the user account name  
11 is duke.brent, does that refer to an Instagram for your  
12 business?

13 A. I am not even certain. I don't know what the Instagram  
14 would be for our business.

15 Q. Are you aware of -- strike that. Let me ask another  
16 question.

17 Are you aware of whether or not 21 Century Smoking  
18 has an Instagram page?

19 A. It might sound ridiculous, but I'm not a hundred  
20 percent -- it might sound ridiculous, but I'm not a hundred  
21 percent sure. I am aware we use our Facebook page. We don't  
22 really use anything else.

23 Q. When you say you are not sure, you have not been involved  
24 in creating an Instagram page for 21centurysmoking.com?

25 A. Yes, someone else may have created it, but I did not.

1 Q. Pinterest, ignoring the asterisk, are you aware of a  
2 Pinterest page for 21 Century Smoking?

3 A. I mean, I have seen it, yes.

4 Q. And what is -- what information would be on your Pinterest  
5 page for your business?

6 A. I haven't looked it over very thoroughly. I didn't make  
7 it. I don't think it is very active.

8 Q. The Twitter service, can you tell me how or what  
9 21centurysmoking.com uses Twitter for?

10 A. We rarely use it, but we used it a little bit more in the  
11 past, just like anyone else uses Twitter, just to promote our  
12 brand.

13 Q. Okay. I would like to then direct your attention  
14 to -- well, strike that for a second.

15 When your lawyers asked you to search for  
16 information, did you ever look for information on Facebook?

17 A. No.

18 Q. Or in the Facebook account for your company?

19 A. No.

20 Q. Why not?

21 A. Because I can't think of any search that they would have  
22 asked for that anything pertinent would have been in Facebook.

23 Q. What about Instagram? Same question.

24 A. No.

25 Q. So the same answer?

1 A. Yes.

2 Q. LinkedIn?

3 A. Same answer.

4 Q. Pinterest?

5 A. Same answer.

6 Q. Twitter?

7 A. Same answer.

8 Q. All right. I would like to move down to what's  
9 described -- and I wrote this report, or at least put the  
10 titles in -- as "Other Web-Based Services."

11 The service Amazon, what did -- explain to me what  
12 21centurysmoking.com used Amazon for.

13 A. I believe about two to three months, maybe, in 2009, we  
14 were selling on Amazon.

15 Q. And you said for two to three months. Is there -- do  
16 you -- do you know the reason why 21centurysmoking.com stopped  
17 selling on Amazon?

18 A. Because they did not allow electronic cigarettes, is the  
19 rule that they created. So we were selling them prior to that  
20 rule, and then they created a rule where you couldn't sell  
21 electronic cigarettes.

22 Q. Okay. And you believe that they stopped allowing you to  
23 sell. Do you know what date that was, or when you said a few  
24 months in 2009, as you sit here, do you have a recall of when  
25 that might have been?

1 A. No, it was -- I would guess somewhere between November,  
2 December of 2009.

3 Q. Okay. Authorize.Net, what is Authorize.Net?

4 A. It's our current payment processor.

5 Q. And explain to me how -- what service Authorize.Net  
6 provides.

7 When you say "payment processor," can you explain to  
8 me how this works?

9 A. So a customer goes on our website, and if they buy  
10 product, they are giving us money with a credit card, and they  
11 are doing it through Authorize.Net.

12 Q. Okay. Similar to if you were on Amazon, and you clicked,  
13 and you paid through PayPal or some other payment system?

14 A. Correct.

15 Q. Okay. And when did you start using Authorize.Net, if you  
16 recall?

17 A. Within the last year or two, BluePay stopped allowing  
18 electronic cigarettes as well. So we used BluePay from 2009  
19 through, I want to say, 2017, 2018, somewhere in there, and  
20 then they shut our account down because they weren't doing  
21 electronic cigarettes, and we had to shift over to  
22 Authorize.Net.

23 Q. Okay. And BluePay, I think you mentioned. When we were  
24 talking about sales data, you mentioned BluePay, correct?

25 A. Correct.

1 Q. Okay. Again, tell me what BluePay does.

2 A. Same exact thing as Authorize.Net, payment processor.

3 Q. Okay. And Carbonite, that's the backup service that you  
4 described using once you were involved in that conference  
5 call?

6 A. Correct.

7 Q. Okay. Dropbox, tell me what information related to  
8 21centurysmoking.com would be in Dropbox.

9 A. I can't think of anything, unless there was some super  
10 large file for a sign or something that we would have needed.  
11 I can't think of any reason why we would have been using  
12 Dropbox.

13 Q. Okay. eBay, can you tell me about eBay?

14 A. That's my wife's eBay account.

15 Q. Do you know if she used it for 21centurysmoking.com  
16 business?

17 A. I don't believe so.

18 Q. PayPal, that's -- when did you stop using PayPal for  
19 business?

20 A. That would have been middle to late 2009. They, as well  
21 as everyone else, stopped processing electronic cigarettes.

22 Q. And was that part of the Amazon not selling electronic  
23 cigarettes anymore or was that separate?

24 A. No, unrelated.

25 Q. Unrelated.

1                   It just happened to be around the same time?

2   A.   Yes, we just got hit by a bunch of them right in the  
3   beginning.

4   Q.   So when PayPal would no longer process e-cigarette  
5   payments, is that when you moved to BluePay?

6   A.   Yes.

7   Q.   And that's separate than a shopping -- well, let's go to  
8   the next thing.

9                   Zen Cart, what is Zen Cart?

10   A.   That's the actual shopping cart. So that's what the  
11   customer is seeing in terms of we put all the products on, and  
12   the customer is able to go through it and pick what they want.

13   Q.   Okay. And did there come a time -- well -- so "Access  
14   acquired."

15                   So Zen Cart is a shopping cart, correct?

16   A.   Correct.

17   Q.   Okay. Did there come a time -- did you ever use Zen Cart  
18   on the 21 Century -- when I say "you," did  
19   21centurysmoking.com's website ever use Zen Cart?

20   A.   Yes, we currently use Zen Cart.

21   Q.   Okay. When was the first time that the  
22   21centurysmoking.com website used Zen Cart?

23   A.   Whenever PayPal shut us down, then we switched over to  
24   Zen Cart and BluePay.

25   Q.   Okay. And so that would have been sometime in mid --



1 A. I'm pretty sure it was 2009.

2 Q. 2009.

3 And can you place it middle, early, late?

4 A. I don't recall.

5 Q. Okay. And at that time, the website -- let's go with

6 2009. That was the first time you had a website for

7 21centurysmoking.com, correct?

8 A. Correct.

9 Q. Who created that site?

10 A. I did.

11 Q. And how did you create it?

12 A. The same kind of template program that I had been using.

13 There is a program called "Dreamweaver," and that's how I did  
14 it.

15 Q. Okay. And do you -- and how did you get Dreamweaver?

16 A. Kirti.

17 Q. Ms. Saraswat gave that to you?

18 A. Yes.

19 Q. Okay. And so can you describe for me how you used

20 Dreamweaver to create the website in 2009?

21 A. Just picked a template that I liked and started plopping  
22 whatever text I wanted on it.

23 Q. Okay. So you picked a template that was -- Dreamweaver  
24 had multiple templates?

25 A. Yes.

1 Q. Okay. So you would pick a template, correct?

2 A. Yes.

3 Q. All right. And then after you picked a template, you said  
4 you would drop stuff or text in.

5 Can you describe exactly how you would do that?

6 A. On the Dreamweaver program, like what the page would look  
7 like is on the right or whatever, and then the other side is  
8 what you are writing, and you can put whatever text you want,  
9 and you will see what it looks like on the website. So there  
10 is two separate screens you are looking at at the same time.

11 Q. So on one screen, you are literally just typing in text,  
12 correct?

13 A. Yes.

14 Q. And then on the other screen, it shows what it would look  
15 like on the website?

16 A. Exactly.

17 Q. Okay. Were you writing code?

18 A. No, just the text part, wherever it tells you to put the  
19 text. Wherever there is space for text is where you would  
20 write the text.

21 Q. Okay. But the website, what makes something show up on  
22 the website is code, correct?

23 A. Correct. Yes, it automated the code on the other side of  
24 the screen.

25 Q. Okay. So you just typed in the text, and the program took

1 care of turning that into code that made the website show what  
2 you were seeing?

3 A. Correct.

4 Q. Okay. And did the template allow for keywords?

5 A. Yes.

6 Q. And how did that work?

7 A. It is the same as the inhaleinside page. There is a spot  
8 that said "Put keywords here," and then you put the keywords  
9 there.

10 Q. Okay. And so that's -- and did you put any keywords in,  
11 in 2009, in this time period when you were creating the  
12 website?

13 Did you put keywords in?

14 A. Actually, Kirti Saraswat would have put in the keywords in  
15 2009.

16 Q. Okay. All right. Now, when -- now, you said Zen Cart.  
17 You switched to Zen Cart, or at some point Zen Cart  
18 became -- again, how did you refer to Zen Cart? What does it  
19 do?

20 A. It is a shopping cart.

21 Q. Okay. So at some point in 2009, you used Zen Cart as part  
22 of your website, correct?

23 A. Yes.

24 Q. Okay. And that was because PayPal stopped taking payment?

25 A. Correct.

1 Q. Okay. So before you used Zen Cart, how would a customer  
2 on your website pay through PayPal, like what would they be  
3 clicking on? How would it work?

4 A. With PayPal, it gives you just a little button you put on  
5 there, and they click on that button, and then it loads them  
6 over to PayPal, and then they are able to purchase it.

7 Q. Okay. And so then PayPal stopped allowing processing for  
8 e-cigarettes, correct?

9 A. Correct.

10 Q. Okay. And then you switched over to Zen Cart, but  
11 Zen Cart is a shopping cart, correct?

12 A. Correct.

13 Q. All right. It is not itself a payment processor?

14 A. No.

15 Q. So how did you handle -- how did -- how were payments  
16 handled?

17 A. Like I said, I had to integrate BluePay and Zen Cart  
18 together in order to be able to process payments.

19 Q. Okay. Did that require you to write code?

20 A. No.

21 Q. So how did you put Zen Cart and arrange for BluePay to be  
22 the payment processor? This is in 2009, when PayPal is no  
23 longer available to you.

24 How did you then get your website to work with Zen  
25 Cart and BluePay?

1 A. Basically, what I had to do is -- I was able to figure out  
2 after a long time -- it took me hours, and it probably should  
3 have taken minutes, because I didn't know what I was  
4 doing -- I was finally able to get Zen Cart and BluePay  
5 together. There was no way I could integrate it actually onto  
6 my website. That was out of my league.

7           So what I did is I did a backslash catalog, and then  
8 on my actual website that I had taken a role in creating, I  
9 just put a link on there like "Visit our store" or something  
10 like that. So then you could click on that button, and then  
11 it would take you over to the shopping cart, and then you  
12 could purchase the product.

13 Q. Okay. Did you consider that -- did you have any opinion  
14 at the time as to whether or not that was the efficient  
15 solution?

16 A. No, it was a terrible solution, but it was the best I  
17 could do.

18 Q. Okay. And at this time, the website that 21 Century  
19 Smoking had was still based on Dreamweaver, correct?

20 A. Yes.

21 Q. Now, at some point in time -- well, let me ask: Did the  
22 integration of Zen Cart with your website ever change?

23 A. Yes. Eventually, Rob Hough was able --

24 Q. Let me ask a question.

25           So the answer is yes?

1 A. Yes. The answer is yes.

2 Q. Okay. When did it change?

3 A. 2011. When Rob Hough started working for us, he was able  
4 to then -- he had the skills necessary to be able to take this  
5 catalog page and integrate it all into the one page so that  
6 there was just a 21centurysmoking.com page and you could  
7 actually buy from.

8 Q. Okay. And let me understand.

9 So prior to -- and do you know off -- do you have a  
10 more specific recall of when Mr. Hough would have been doing  
11 this? You said 2011. Do you know if it was early, late?

12 A. Something like September, October, somewhere in there.

13 Q. Okay. So before Mr. Hough did something, you described  
14 they would have to click a link that says "Visit our store,"  
15 and then that would take them to Zen Cart, correct?

16 A. Yes, some link, and it would take you over to the store.

17 Q. To a catalog page?

18 A. Yes.

19 Q. And then that would just have a list of all the product  
20 you sold?

21 A. It would have the different links to go to the different  
22 products and stuff like that, yes.

23 Q. And why was that not the ideal solution? What is it that  
24 Mr. Hough was doing or changed that made it more efficient?

25 A. You don't ever want to have your customer having to click

1 a button to get to your store. You want them to go to your  
2 website, and you want it to be your store. So he made it so  
3 that when you go to my website, now you are at my store, as  
4 opposed to going into my website and searching around for a  
5 button, clicking that button, and now being at the store.

6 Q. Okay. So the difference would be that when you were able  
7 to get Zen Cart to work with your website, they would have to  
8 click on a Zen Cart button or go-to-my-store button, correct?

9 A. Yes.

10 Q. And then that would take them to a new page where they  
11 could then arrange to buy your product, correct?

12 A. Exactly.

13 Q. And what you wanted -- and in the newer, or after  
14 Mr. Hough was done, they could literally buy it from the  
15 landing page?

16 A. Yes. You go to 21centurysmoking.com, and it was all  
17 integrated.

18 Q. And purchase product from the page they landed on?

19 A. Exactly.

20 Q. Okay. And you said Mr. Hough did something with the Zen  
21 Cart in your website, and this was in September or October of  
22 2011, correct?

23 A. Correct.

24 Q. Do you understand what he did with your website at that  
25 time?

1           When I say "do you understand," I know you -- strike  
2   that.

3           Do you understand -- strike that.

4           THE COURT: Do you know how he did it?

5           MR. SALAM: There you go.

6   BY MR. SALAM:

7   Q. Do you know how he did it?

8   A. Basically, he was taking all of the content from what was  
9   the home page, the home page and the different links that I  
10   had created, so he was able to take all that content and just  
11   basically transfer it over to the shopping cart, and then  
12   integrate, kind of, the fill of the original home page into  
13   the shopping cart page.

14           So it was just he was messing with templates and  
15   headers and text. So, I mean, it was -- like I said, it was  
16   more than I could do, but he was just basically trying to get  
17   the feel of the old site, combine it with the shopping cart  
18   and make it one page.

19   Q. So at this point when Mr. Hough is involved, your website  
20   is no longer on the Dreamweaver -- would "platform" be a term  
21   that makes sense?

22   A. I mean, Dreamweaver is just what you use to make the site.  
23   So it was no longer the site that has been created with  
24   Dreamweaver, that's correct. It was now its own entity that  
25   had nothing to do with the original site that had been



1 created.

2 Q. Okay. When you say it was its own entity, it was a  
3 website that Mr. Hough, he took the content from your old  
4 website, and somehow your website now was created through a  
5 Zen Cart platform?

6 A. Correct.

7 Q. Okay. And then how does BluePay fit into that?

8 A. You still need the processor. So Zen Cart is a shopping  
9 cart, but the people still need to give you money. So they  
10 get to the point where they are going to make a purchase.  
11 They are still getting it through BluePay, is who they are  
12 paying. They are not paying Zen Cart.

13 Q. Okay. And are you required to use BluePay when you are  
14 using Zen Cart?

15 A. No.

16 Q. So you can pick other payment processors?

17 A. Yes.

18 Q. And was it Mr. -- and Mr. Hough then arranged or did  
19 whatever had to be done within the Zen Cart platform to make  
20 BluePay the payment processor?

21 A. No, I had already done that when I lost PayPal. So in  
22 2009, I had got BluePay and Zen Cart integrated. It was just  
23 I didn't get it integrated onto the website. Rob did that in  
24 2011.

25 Q. Okay. So in 2011, he basically took the existing website

1 and created that content within the Zen Cart platform?

2 A. Yes.

3 Q. Okay. And the biggest benefit of that was that that  
4 allowed your customers to purchase product right off the page,  
5 the first page that they land on?

6 A. Exactly.

7 Q. Because I assume -- well, strike that.

8 You did not want your customers having to click any  
9 extra times before giving you money; is that correct?

10 A. Exactly.

11 Q. Okay. Back to the status report, Page 9.

12 RankPop, can you tell me what RankPop is?

13 A. I mean, it is a company that we used to do social media  
14 postings.

15 Q. So what service did they provide you?

16 A. Social media postings. They were just going on, like,  
17 Facebook and posting ads or posting content. It is a content  
18 provider for social media platforms.

19 Q. Okay. And was it content they created or content you  
20 provided them?

21 A. They created it.

22 Q. Okay. And then they would post it on your Facebook page?

23 A. Yes.

24 Q. Okay. And I think yesterday -- or, I'm sorry -- Monday,  
25 you testified that the information about RankPop is on

1 Facebook.

2 Do you recall that?

3 A. Yes, yes.

4 Q. What did you mean by that?

5 A. Well, that's where they were posting all the stuff they  
6 were posting. So if you go on my Facebook page now, and you  
7 figure out when they were working for me, all the stuff you  
8 see posted at that time would be whoever the RankPop person  
9 working was.

10 Q. Okay. So explain to me how -- did they ask you before  
11 they posted something to your social media page?

12 A. They might run it by me.

13 Q. Okay. And so, do you recall, did you access RankPop or  
14 your information for the services they provided for you  
15 online? Did you go to -- did they have an account for you?

16 A. No, they would send me an invoice. I would pay it. There  
17 wasn't like a -- I don't recall a place where I, like, logged  
18 in and did anything.

19 Q. Okay. So your account -- they would send you a bill, and  
20 you would send them a check?

21 A. Yes, to the best of my recollection, yes.

22 Q. Okay. Groupon, how did 21 Century Smoking use Groupon?

23 A. We would give discounts at stores for products, just  
24 Groupons. We would have Groupons, and you could buy the  
25 Groupon and go to our stores and utilize them.

1 Q. Okay. Do you recall if you could access your account  
2 information online for Groupon?

3 A. I didn't actually. Steve Spraker handled all of that. I  
4 never did anything with Groupon. That was kind of Steve  
5 Spraker's responsibility.

6 MR. SALAM: Could I have a moment, your Honor?

7 THE COURT: Sure.

8 MR. SALAM: Your Honor, I'm going to need a few  
9 minutes to get organized. I don't know if we can take -- if  
10 the court is willing to take a break for ten minutes.

11 THE COURT: So you are going to figure out how much  
12 you have left, go through your notes, that kind of thing?

13 MR. SALAM: Yes, I can give you a quick -- I would  
14 think -- well, I'm hopeful that it is no more than an hour.

15 THE COURT: Okay.

16 MR. SALAM: Certainly, I plan on being finished by  
17 today.

18 THE COURT: Okay. Well, I'm signing warrants at  
19 5:00 o'clock, and someone is coming in in an orange jumpsuit  
20 at 5:00 o'clock. So we are going to be done by 5:00 o'clock.

21 MR. SALAM: I meant done with my questioning of  
22 Mr. Duke.

23 THE COURT: Got you. All right. Let's take a break.

24 (Recess taken.)

25 THE COURT: Whenever you are ready.

1 BY MR. SALAM:

2 Q. Mr. Duke, with respect to 21centurysmoking.com, to the  
3 best of your recollection, when did -- what did you retain  
4 Ms. -- did you retain Ms. Saraswat, Kirti Saraswat, to do work  
5 on 21centurysmoking.com?

6 A. Yes.

7 Q. Do you recall when you retained her to do work on your  
8 website?

9 A. I had been paying her since 2007 for the Sports Doctrine  
10 website, so the lines kind of blur. I can't remember exactly  
11 when she started with 21 Century Smoking, but she would have  
12 started from the very beginning, whenever the site went live.  
13 She would have been doing a cost-savings calculator or any  
14 like additional thing that was beyond my skills of just  
15 entering text. So if I needed pictures moved around the site  
16 or if I needed things changed, she would have been doing that,  
17 and then she was also doing SEO work.

18 Q. Okay. And I want to unpack that a little.

19 So before she was doing work on the  
20 21centurysmoking.com website, what site was she working on?

21 A. She built the Sports Doctrine website.

22 Q. Okay. And that was -- was that in 2007?

23 A. Yes.

24 Q. Okay. And just briefly, what was the concept behind the  
25 sportsdoctrine.com website?

1 A. It was kind of like a social media platform for sports.

2 Q. Okay. And did she create that website or did you create  
3 that website?

4 A. She created that website.

5 Q. And do you know what platform or software she used?

6 A. I know, initially, we were trying to get her to use Ruby  
7 on Rails, and that didn't end up working out. So I don't  
8 remember what she actually ended up using.

9 Q. All right. When you say "We were trying to get her to use  
10 Ruby on Rails," who is "we"?

11 A. Otis Chandler and myself were doing that site together, or  
12 we were going to partner on that site, and he really wanted it  
13 on Ruby on Rails.

14 Q. And can you explain to me what -- or to the court what  
15 "Ruby on Rails" is?

16 A. It is a programming language.

17 Q. Okay. My guess is the court knows better than I do, but  
18 for the record, at least.

19 And are you able to use Ruby on Rails yourself?

20 A. No.

21 Q. Okay. And then at some time in the -- sometime in 2009 is  
22 when Ms. Saraswat started doing work on 21centurysmoking.com?

23 A. Yes, early 2009.

24 Q. All right. Early 2009?

25 A. Yes.

1 Q. And what work did you have her do on 21centurysmoking.com?

2 A. As I said, I mean, anything that was more complex than  
3 entering text. So moving around images, all of the SEO, all  
4 of the meta tag, anything in the back-end, and any just moving  
5 things around like the cost savings calculator. Any of that  
6 type of stuff is what she either assisted me with or the SEO  
7 as well.

8 Q. And can you, for the record, explain what your  
9 understanding of "SEO" is?

10 A. Search engine optimization, so trying to get your website  
11 higher up on Google rankings, essentially.

12 Q. So when someone enters in Google search that would result  
13 in your website coming up, it is designed to make your website  
14 come up higher on the list than other responsive websites?

15 A. Correct, yes.

16 Q. Okay. Did you ever instruct Ms. Saraswat to put 21st  
17 Century Smoke in the metadata of your company's website?

18 A. No.

19 Q. You didn't do that by text?

20 A. No.

21 Q. Or by e-mail?

22 A. No.

23 Q. Or by Gchat?

24 A. No.

25 Q. Or by Yahoo! Chat?

1 A. No.

2 Q. Or by any other means?

3 A. No.

4 Q. All right. I'm going to switch topics here.

5 What I would like to do, just so you are  
6 understanding, I want to make sure I understand the timelines.  
7 So I'm going to ask you a set of questions and try and  
8 establish for the record a timeline of events here.

9 As I think I had mentioned, according to the Docket  
10 Filing No. 1, this case was filed on September 7th, 2012, and  
11 Mr. Leavens filed his appearance on October 3rd, 2012.

12 Taking those two dates, if you can accept them, does  
13 that -- now I would like to ask you if you -- when you think  
14 the first time you met Tom Leavens occurred?

15 A. Before he filed an appearance, clearly. Within a week of  
16 the case being on the docket would be my best guess.

17 Q. But certainly before October 3rd, when the  
18 docket -- strike that.

19 You believe you met with him before October 3rd,  
20 2012, when he filed an appearance?

21 A. Of course, yes, September.

22 Q. Okay. So sometime in September, you met with him?

23 A. Yes, mid-September would be my best guess.

24 Q. Okay. And that was the meeting which you had testified  
25 about him telling you not to destroy anything, correct?



1 A. Correct.

2 Q. I think the court said we had "gilded that lilly," so I  
3 will leave it alone at this point, except for one question:  
4 At that meeting, did Mr. Leavens ever use the term "ESI"?

5 A. I don't recall.

6 Q. At the time of that meeting -- strike that.

7 You remember -- strike that.

8 You are aware that on June 16th, 2014, Judge Kapala  
9 entered an order granting partial summary judgment in your  
10 favor?

11 A. Yes.

12 Q. And that was June 16th, 2014?

13 A. Yes, I have no reason not to believe that's the date, yes.

14 Q. Correct. Okay.

15 And then I would like to direct your attention to  
16 Defendants' Exhibit 4.

17 Yes, Defendants' -- I'm sorry, hold on a second. Let  
18 me make sure I have got the right -- maybe I meant Plaintiff's  
19 Exhibit 4.

20 Hold on a second. Let me check.

21 Strike that.

22 I'm confusing Defendants' and Plaintiff's.

23 Defendants' Exhibit 4, which would be the exhibit I  
24 provided -- yes, Defendants' Exhibit 4 -- and just for the  
25 record, I'm not sure -- this is an e-mail from Brian Gaynor to

1 Heather Liberman dated November 5th, 2014.

2 Have you seen this document before?

3 A. In preparation for today, yes.

4 Q. Okay. Prior to preparing for this hearing, had you ever  
5 seen this document before?

6 A. No.

7 Q. You see in there, there is what we now understand to be 20  
8 terms, correct?

9 A. Correct.

10 Q. You see those?

11 A. Yes.

12 Q. Did your lawyers ever ask you to search your e-mails for  
13 these 20 terms?

14 A. No.

15 Q. And what do you -- if you have it, do you have an  
16 understanding what these 20 search terms are?

17 A. They are the search terms that the Plaintiffs requested be  
18 searched on our ESI, I guess.

19 Q. Okay. And do you remember on the first day of this  
20 hearing, Mr. Davis walked through -- he wanted to establish a  
21 common understanding of ESI.

22 Do you remember that testimony?

23 A. Yes.

24 Q. And he indicated that he considered e-mails ESI, correct?

25 A. Yes.

1 Q. And he asked that you understood that when he said ESI, he  
2 meant e-mails, correct?

3 A. Correct.

4 Q. And he stated that when he used the term ESI, he meant  
5 Yahoo! chats?

6 A. Correct.

7 Q. And he meant -- well, he went through a list of what he  
8 meant by ESI, correct?

9 A. Yes.

10 Q. Okay. And my question is: At the time of your meeting  
11 with Mr. Leavens, did you understand -- did you have an  
12 understanding of what ESI was?

13 A. No, not really.

14 Q. Well, you say, "No, not really."

15 Did you have --

16 A. I mean, I just knew not to delete things, but I  
17 didn't -- I wouldn't -- I wouldn't know what the term ESI  
18 meant or anything like that.

19 Q. Okay. At some point, did you -- you have an understanding  
20 now of what ESI means, correct?

21 A. Definitely, yes.

22 Q. And what is your understanding?

23 A. Electronic stored information.

24 Q. Okay. Electronically stored information?

25 A. Right. I think that's what it is called. I think that's

1 what they said yesterday, so yes.

2 THE COURT: It is.

3 MR. SALAM: I'm only asking for what you understand.

4 THE WITNESS: Yes, electronically stored information.

5 BY MR. SALAM:

6 Q. Okay. And do you recall Mr. Leavens ever using that term  
7 with you?

8 MR. SMITH: Objection, your Honor, asked and answered  
9 just a moment ago.

10 THE COURT: Are you saying electronically stored  
11 information or ESI? Because you did ask whether he used the  
12 term ESI, and he said no. So I don't know if your question is  
13 did he use the term electronically stored information.

14 MR. SALAM: Yes.

15 BY MR. SALAM:

16 Q. I would like to ask did you ever -- do you recall --

17 THE COURT: With that clarification, it will be  
18 overruled.

19 THE WITNESS: In what time frame?

20 MR. SALAM: Well, at the first meeting.

21 THE WITNESS: I don't recall that exact term being  
22 used in the first meeting, no.

23 MR. SALAM: Okay.

24 BY MR. SALAM:

25 Q. All right. Do you recall when -- well, your current

1 understanding is "ESI" means electronically stored  
2 information?

3 A. Correct.

4 Q. And you -- strike that. We are going to -- I will get  
5 back to that.

6 Okay. And, again, just trying to establish a  
7 timeline here.

8 It was your testimony that you discovered the GoDaddy  
9 auto-purge setting on June 29th, 2015, correct?

10 A. Correct.

11 Q. That was your testimony in court, correct?

12 A. Yes.

13 Q. Okay. And I believe counsel had directed your attention  
14 to prior statements where I think it was May 2015, you had  
15 stated, approximately, May of 2015?

16 A. Approximately, May of 2015, yes.

17 Q. Okay. And you are aware that -- strike that.

18 So I think you testified that you did a lot of  
19 searches for e-mails at the request of your attorneys,  
20 correct?

21 A. Yes.

22 Q. And whatever responses -- whatever you found as a result  
23 of those searches, you provided to your attorneys, correct?

24 A. Yes.

25 Q. And that continued up and through January 15, 2018, when

1 Plaintiff's filed their summary judgment memorandum?

2 A. Yes.

3 Q. Now, you are aware that when your lawyers would produce  
4 documents to Plaintiff's counsel, they would put what is  
5 referred to as a "Bates number" on them?

6 A. I am aware of that now, yes.

7 Q. Okay. Yes, I'm asking for your current understanding.

8 So you are aware that that --

9 A. Yes, I have seen them now in preparation.

10 Q. Okay. Were you involved in numbering the documents?

11 A. No.

12 Q. Were you involved in the actual choice of what to give  
13 Plaintiff's counsel?

14 A. No.

15 Q. So when you made a decision -- strike that.

16 You didn't decide what to give your  
17 attorneys -- well, strike that.

18 If your attorneys asked for information, you would  
19 decide where you thought that information was, correct?

20 A. Correct.

21 Q. And you would go look there, correct?

22 A. Yes.

23 Q. And you would provide whatever you found?

24 A. Correct.

25 Q. Okay. And that's how you handled it until -- from the

1 first day that former defense counsel was representing you  
2 until the last day, correct?

3 A. Yep.

4 Q. All right. I would like to direct your attention to  
5 Defendants' Exhibit No. 5.

6 For the record, this is the declaration of Travis  
7 Life, originally filed as Docket No. 253-2.

8 You recall reviewing this in the course of your  
9 testimony over the two days of this hearing?

10 A. Yes.

11 Q. And I would like to direct your attention to Paragraph 11  
12 at Page 3, and, again, I'm just trying to make sure I get the  
13 time right.

14 So on or about March 14th or 15th, that's when you  
15 had contact from Mr. Life seeking -- asking you to search for  
16 the information he identifies here, correct?

17 A. Yes.

18 Q. Okay. So you were looking for information related to  
19 Ms. Wood, correct?

20 A. Yes.

21 Q. To Kirti Saraswat?

22 A. Yes.

23 Q. And Webrecsol is how it is spelled here?

24 A. Correct.

25 Q. Okay. And how is her company -- that's the company she

1 works for, correct?

2 A. I think she owns it, yes.

3 Q. Okay. And is it spelled W-e-b-r-e-s-c-o-l or c-s-o-l?

4 A. c-s-o-l.

5 Q. Okay. So it is misspelled here?

6 A. Yes.

7 Q. Okay. And he asked you to look for correspondence with  
8 respect to Frank Gu, correct?

9 A. Correct.

10 Q. Now, he asked you to research your brentduke@yahoo.com; do  
11 you see that, in Paragraph 11?

12 A. Yes.

13 Q. Okay. Did you search other e-mail accounts besides  
14 brentduke@yahoo.com?

15 A. support@21centurysmoking.com.

16 Q. Okay. Did you search bduke@21centurysmoking.com?

17 A. A lot of it would be duplicative of the Yahoo! account,  
18 but, yes, I searched bduke@21centurysmoking.com,  
19 brentduke@yahoo.com, and the support@21centurysmoking.com.

20 Q. And these are the three accounts you always searched when  
21 you were asked to look for information?

22 A. Exactly.

23 Q. Because those were the three accounts you used?

24 A. Exactly.

25 Q. Okay. And they didn't ask you to search other people's



1 accounts, correct?

2 A. No.

3 Q. And you didn't think to search other people's accounts?

4 A. No, I can't think of any reason why I would have.

5 Q. Okay. And you then forwarded the information to Mr. Life,  
6 correct?

7 A. Correct.

8 Q. And I believe it was your testimony that the e-mails you  
9 found that you forwarded are -- were included in Plaintiff's  
10 Exhibit 1?

11 Well, I will direct your attention to Plaintiff's  
12 Exhibit 1.

13 And the first page -- I'm sorry.

14 A. Yes.

15 Q. Just a moment. Let me let the court --

16 So the first page of that exhibit is an e-mail from  
17 Mr. Stamatis to Mr. Davis and Mr. von Ohlen providing certain  
18 documents.

19 Do you see that?

20 A. Yes.

21 Q. Okay. And do you see in there that it says they have been  
22 Bates-stamped 21C 63515 to 21C 6326?

23 A. Yes.

24 Q. Okay. And I believe your testimony was that the rest of  
25 the pages of this exhibit are what you would have sent to

1 Mr. Life, correct?

2 A. Correct.

3 Q. Okay. I will ask you to turn to what is identified on the  
4 top as Page 62 of 732 in the docket entry. It's,  
5 approximately, a half inch back.

6 A. Okay.

7 MR. SALAM: Your Honor, have you been able to find  
8 that?

9 THE COURT: Yep, 21 63574.

10 MR. SALAM: Correct. The Bates number is 21C 63574.

11 BY MR. SALAM:

12 Q. And that's an e-mail from -- do you recognize who that  
13 e-mail is from?

14 A. kirti@webrecsol.com.

15 Q. Okay. And it was sent to?

16 A. support@21centurysmoking.com.

17 Q. And where is that e-mail hosted?

18 A. The GoDaddy web server.

19 Q. Okay. And do you see at the bottom of this page, above  
20 the "Confidential Restricted" line, do you see a line there in  
21 small print?

22 A. Yes.

23 Q. Can you read that line through the .com?

24 A. "https://email06.godaddy.com."

25 Q. Okay. And this is one of the documents you provided to

1 Mr. Life on or about March 17, 2019?

2 A. Correct.

3 Q. Okay. I would like to direct your attention, I would say,  
4 about three-eighths of an inch further back to a document that  
5 has the Docket No. 87 -- or Page No. 87 of 732.

6 THE COURT: You said March 17th, 2019?

7 MR. SALAM: I'm sorry. March 17th, 2018.

8 THE COURT: See, I'm paying attention.

9 MR. SALAM: Thank you, your Honor.

10 THE COURT: You're welcome.

11 MR. SALAM: I actually have a timeline demonstrative  
12 exhibit that I'm trying to work off of.

13 THE COURT: Okay.

14 THE WITNESS: Which page are we going to?

15 BY MR. SALAM:

16 Q. We are looking for Page 87 of 732. The Bates number is  
17 63599.

18 A. Okay.

19 Q. And that, again, is -- and who is that e-mail from?

20 A. kirti@webrecsol.com.

21 Q. And who is it -- or where is it sent to?

22 A. support@21centurysmoking.com.

23 Q. And, again, if you can look at the bottom, the line above  
24 "Confidential Restricted," and read it, for the record, up to  
25 ".com"?

1 A. "https://email06.godaddy.com."

2 Q. Thank you.

3 I would like to direct your attention five more pages  
4 back, to a page that is Docket Page 92 of 732.

5 A. Yes.

6 Q. Okay. Did you find that?

7 A. Yes.

8 Q. Okay. And it is Bates-numbered, for the record,  
9 21C 63604, and, again, that's an e-mail from  
10 kirti@webrecsol.com?

11 A. Correct.

12 Q. And it is to support@21centurysmoking.com?

13 A. Yes.

14 Q. And if you, again, read for the record what is above  
15 "Confidential Restricted"?

16 A. "https://email06.godaddy.com."

17 Q. Okay. Only a couple more.

18 I would like to direct your attention to two pages  
19 behind that to a page that is 94 of 732.

20 A. Okay.

21 Q. And that is Bates number 21C 63606. Again, that is from  
22 kirti@webrecsol.com, correct?

23 A. Yes.

24 Q. And to support@21centurysmoking.com?

25 A. Correct.

1 Q. And, again, can you read, for the record, what is above  
2 the "Confidential Restricted"?

3 A. "https://email06.godaddy.com."

4 Q. And last one -- no, actually, that is the last one for  
5 that exhibit.

6 And, again, these were documents that you provided to  
7 your -- I believe it is to Mr. Life, on or about March 18th,  
8 2018, correct?

9 A. Correct.

10 Q. And it's your understanding that those were turned over by  
11 your attorneys to Plaintiff's counsel within a couple days  
12 thereof, correct?

13 A. Correct.

14 Q. All right. I would like to direct your attention to what  
15 is marked as Defendants' Exhibit 53.

16 MR. SALAM: And has this been admitted already,  
17 counsel?

18 MR. DAVIS: Yes.

19 THE WITNESS: I don't know if I have that.

20 MR. SALAM: Oh, I'm sorry. It is not in the binder,  
21 not in your binder.

22 Your Honor, do you have that?

23 THE COURT: I don't know. I was picking it up, and  
24 you told me to stop looking.

25 Hold on one second.

1           You said 53?

2           MR. SALAM: Yes. It was one of the weekend --

3           THE COURT: If you gave it to Ms. Pedroza, it is in  
4 here somewhere, and I know I saw an e-mail. So I will find  
5 it.

6           53, I have it.

7           MR. SALAM: I'm going to hand it to you, Mr. Duke.  
8 Don't worry. You don't have it. I had only come up with 52  
9 exhibits.

10          I'm sorry. Your Honor, may I approach the witness?

11          THE COURT: Sure.

12          MR. SALAM: Thank you.

13 BY MR. SALAM:

14 Q. If you could take a moment and review that.

15 A. Okay.

16 Q. Do you recall --

17          THE COURT: Okay. Go ahead.

18          MR. SALAM: I want to make sure I have the right one.

19          It is up there, actually.

20 BY MR. SALAM:

21 Q. Actually, I would like to refer you to, and I'm going to  
22 hand you, what I'm going to mark as Defendants' Exhibit 54.

23          I apologize. I was off on the exhibit I wanted to  
24 refer to.

25          MR. SALAM: May I approach the witness, your Honor?

1 THE COURT: Sure.

2 BY MR. SALAM:

3 Q. Could you please review Plaintiff's Exhibit 54?

4 A. Okay.

5 Q. And do you -- what's the date on this e-mail?

6 A. March 17th, 2018.

7 Q. On the first page, correct?

8 A. Yes.

9 Q. Okay. And you have reviewed the whole exhibit, correct?

10 A. Yes.

11 Q. Okay. So I'm going to direct you to Page 3 of 5, and if  
12 you could read the top two lines at the top of Page 3 of 5?

13 A. "So I searched for Kirti e-mails, and I mean there are  
14 hundreds of them. Not sure if you just want my password or  
15 what? But I don't really know what you want me to do with  
16 this information."

17 Q. And if you go to the prior page, 2 of 5, that would  
18 indicate that you wrote that e-mail to Mr. Life on March 17th,  
19 2018, correct?

20 A. Yes.

21 Q. Okay. Do you recall if you -- you testified that you had  
22 offered your e-mail password. Was it password or passwords to  
23 your attorneys previously?

24 A. Yes, I had offered passwords previously.

25 Q. Okay. Do you know if you offered your password to

1 Mr. Life on or about this date?

2 A. Yes, I did.

3 Q. And is that -- did you do it by e-mail, by phone?

4 Do you recall?

5 A. Well, in this e-mail, I'm offering it.

6 Q. And where do you see that?

7 A. "Not sure if you just want my password or what?"

8 Q. Thank you.

9 And that's on which page -- there we go. I'm sorry,  
10 Page 3 of 5.

11 I'm having trouble with my own notes. I apologize.

12 And that's Defendants' Exhibit 54.

13 You wrote this, correct?

14 A. Yes.

15 MR. SALAM: Okay. I would ask that that be admitted,  
16 your Honor. If it hasn't, I wasn't sure. I can't recall.

17 MR. DAVIS: It is already in evidence.

18 THE COURT: I have got it already in.

19 MR. SALAM: All right.

20 BY MR. SALAM:

21 Q. And that was on March 17th, 2018, correct?

22 A. Correct.

23 Q. And that was prior to the time when your attorneys sent  
24 over the documents you had found in your search on or about  
25 that date, correct?



1 A. Yes.

2 Q. Okay. I would like to direct your attention to, and I'm  
3 going to hand it to you, Defendants' Exhibit 57.

4 MR. SALAM: May I approach the witness, your Honor?

5 THE COURT: Sure.

6 (Brief pause.)

7 MR. SALAM: May approach the witness, your Honor?

8 THE COURT: Sure.

9 BY MR. SALAM:

10 Q. I will hand you what I have marked as Defendants'  
11 Exhibit 57 and ask you to review both pages.

12 You have reviewed it?

13 A. Yes.

14 Q. All right. I would like to direct your attention to the  
15 second page.

16 Can you read what you wrote -- you wrote this,  
17 correct?

18 A. Correct.

19 Q. Okay. And can you read for the record what you are saying  
20 there?

21 A. "Would it be wise to provide you with passwords to my  
22 e-mail so you can sort through it and make sure nothing you  
23 need?? Issue is with me being so far away, it isn't like you  
24 can easily swing by and peruse my inbox. Brent."

25 Q. And then if you go to the next page at the bottom, you

1 sent that e-mail on May 3rd to Mr. Stamatis, correct, if you  
2 know?

3 Can you tell?

4 A. Yes, I can't tell who it went to.

5 Q. Okay. But Mr. Stamatis responds on May 7th, correct?

6 A. Yes.

7 Q. And what does Mr. Stamatis say?

8 A. "Please send over this information ASAP. Thanks."

9 Q. Okay. And then the e-mail at the top of this page, that's  
10 from you to Mr. Stamatis, correct?

11 A. Yes.

12 Q. And it's copied to Mr. Life and Mr. Leavens?

13 A. Correct.

14 Q. And that's on May 7th, 2018, correct?

15 A. Correct.

16 Q. Okay. And that first line with the "https://", what  
17 is -- if you know, what is that?

18 A. That's where you go to log in to the GoDaddy webmail.

19 Q. Okay. So you -- at the top of this, it has a link to log  
20 in to your GoDaddy e-mail accounts?

21 A. Yes.

22 Q. Okay. And would that allow them to log in to your account  
23 and see all your GoDaddy e-mails?

24 A. Correct.

25 Q. Okay. So not just the support@21centurysmoking.com or

1 your bduke@21centurysmoking.com?

2 A. No, this would have given them the ability to see, if  
3 you -- this gives you the login. So you would go to  
4 bduke@21centurysmoking.com, enter the password, or you could  
5 choose to go to support@21centurysmoking.com, enter the  
6 password. Technically, you can do any of those accounts from  
7 there, but I only gave them the password for those two.

8 Q. Okay. So if they had gone there, they could only get into  
9 the two accounts that you then list below, correct?

10 A. Correct.

11 Q. And can you read the rest of the e-mail?

12 A. It is "To be safe" -- or "Re: To be safe."

13 And then it is: "That link should take you to  
14 godaddy webmail login (or just google "godaddy webmail login);  
15 and then my 2 e-mail addresses are bduke@21centurysmoking.com,  
16 pw: forfun; or support@21centurysmoking.com, pw: for3fun3; or  
17 brentduke@yahoo.com, pw: Norvtasb33\*. (I think this is right.  
18 If this doesn't work, let me know.)

19 "That is all I can think of in terms of e-mails. If  
20 you can think of any more, let me know.

21 "Thanks, Brent."

22 Q. I would like to direct your attention now to Defendants'  
23 Exhibit 58, which you don't have, but I will hand up, and it  
24 is one of the weekend or Monday e-mails I sent to everybody.

25 I would ask you to review that.

1 A. Okay.

2 Q. All right. Does this refresh -- I think your prior  
3 testimony was that at some point, 4Discovery obtained or  
4 downloaded all your e-mails from your brentduke@yahoo.com  
5 account, correct?

6 A. Correct.

7 Q. Okay. And I believe you were not able to identify  
8 specifically when that occurred, correct?

9 A. Correct.

10 Q. Okay. And having reviewed this e-mail, does that refresh  
11 your recollection as to when that occurred?

12 A. It looks like May 8th.

13 MR. SALAM: Your Honor, I would ask that Defendants'  
14 Exhibit 58 be admitted.

15 MR. DAVIS: No objection.

16 THE COURT: Okay. 58 will be admitted.

17 (Defendants' Exhibit 58 was offered and received in  
18 evidence.)

19 BY MR. SALAM:

20 Q. So I just want to make sure I get the timing right here.  
21 So the day before, you had offered your attorneys the  
22 passwords to brentduke@yahoo.com, correct?

23 A. Correct.

24 Q. Okay. And the next day, that's when 4Discovery downloaded  
25 that information, correct?

1 A. Correct.

2 Q. All right. But the day before, you had also offered your  
3 attorneys, identified in the prior, I think, Defendants'  
4 Exhibit 57, you had also offered them your passwords to both  
5 bduke@21centurysmoking.com and support@21centurysmoking.com,  
6 correct?

7 A. Correct.

8 Q. And those were hosted at GoDaddy, correct?

9 A. Correct.

10 Q. Okay. Now, I would like to direct your attention to  
11 May 30th, 2019, of this year.

12 You were in Chicago on that day, correct?

13 A. Correct.

14 Q. And I think your testimony was you were meeting with  
15 Mr. Stamatis and Mr. Shonder, correct?

16 A. Correct.

17 Q. And I think your testimony was that was in the course of  
18 helping them with the response to the motion for sanctions,  
19 correct?

20 A. Correct.

21 Q. All right. And when I say "motions for sanctions," I'm  
22 referring to the 75-page motion that was filed by Plaintiff's  
23 counsel, okay?

24 Is that your understanding?

25 A. Yes.

1 Q. Okay. Now, at some time during that meeting, did a  
2 discussion of whether or not your bduke@21centurysmoking.com  
3 and support@21centurysmoking.com had been subject to the 20  
4 search terms that we have discussed?

5 A. Was that discussed?

6 Q. Strike that. Let me try a better question.

7 All right. During this meeting on May 30th with  
8 Mr. Shonder and Mr. Stamatis, did the topic of  
9 your -- searching your accounts at 21 Century Smoking,  
10 brentduke@ -- I'm sorry, bduke@21centurysmoking.com and  
11 support@21centurysmoking.com, did that -- did a discussion or  
12 did those issues come up?

13 Whether or not those had been searched, did that come  
14 up at the meeting?

15 A. Yes.

16 Q. And can you tell me what you recall as to how that came  
17 up?

18 A. I was in my general GoDaddy account where you can see all  
19 of the e-mails, and I believed that my lawyers had everything  
20 they needed from bduke and -- bduke@21centurysmoking,  
21 support@21centurysmoking, and brentduke@yahoo.com, but I was  
22 asking the lawyers if they thought they needed like these -- I  
23 figured there would be nothing, but rob@21. So I said there  
24 is other e-mail addresses, and that was the first time they  
25 were aware, then, of these other e-mail accounts, and that's

1 what I was discussing.

2 Q. Okay. And when you said you were looking at the computer,  
3 were they with you on the computer, or did you show them  
4 something on the computer?

5 A. I believe I eventually showed them, but they were not  
6 sitting -- they were not sitting with me. I was sitting on  
7 the other side of the room.

8 Q. And can you tell me what you showed them on the computer?

9 A. Kind of the list of all the e-mail accounts.

10 Q. All right. I'm going to hand you what is -- let's call  
11 this -- I'm going to call it -- hold on.

12 Just to make life easy, I'm going to call this -- I'm  
13 going to call it Defendants' 63 because I know I have a 62 I  
14 may use. So let's call this Defendants' 63.

15 MR. SMITH: This is something new?

16 MR. SALAM: Yes. I have got a copy for everybody.

17 THE COURT: And we are going to take a -- we will all  
18 take a look at it over a couple of minutes so that we can read  
19 it.

20 (Brief pause.)

21 MR. SALAM: All right. I gave away all my copies.

22 BY MR. SALAM:

23 Q. Mr. Duke, was this the screen or something similar that  
24 you showed counsel on May 30th --

25 A. You didn't give me one.

1 THE COURT: Well, Mr. Smith needs it more than I do.

2 MR. SALAM: Okay. Thank you, your Honor.

3 MR. SMITH: Thank you, your Honor.

4 THE COURT: Not a problem.

5 THE WITNESS: Yes.

6 BY MR. SALAM:

7 Q. Okay. So just, again, for the record, so this is a  
8 copy -- this is the type of screen you showed them at the  
9 time?

10 MR. SMITH: Objection, your Honor. A minute ago, it  
11 was "this or something similar."

12 MR. SALAM: Okay.

13 MR. SMITH: And that got by me because I was looking  
14 for the exhibit.

15 THE COURT: Okay. What do you recall showing counsel  
16 at this meeting?

17 Sustained.

18 MR. SMITH: Thank you, your Honor.

19 THE COURT: What do you recall showing counsel at  
20 this meeting?

21 THE WITNESS: A list of the e-mail accounts in my  
22 GoDaddy.

23 BY MR. SALAM:

24 Q. And is Defendants' Exhibit 63 what you showed your -- is  
25 this the type of screen you showed Defendants -- I'm



1     sorry -- showed Mr. Shonder and Mr. Stamatis at that meeting?

2     A.   I can't remember if they specifically ran over and looked  
3     at my screen, but, yes, this is what I was looking at.  This  
4     is what I described to them, and I believe I showed it to  
5     them, yes.

6     Q.   Okay.

7                 MR. SALAM:  Your Honor, I would ask that Defendants'  
8     Exhibit 63 be admitted.

9                 THE COURT:  Any objection?

10                MR. DAVIS:  No objection.

11                THE COURT:  All right.  63 will be admitted.

12                THE WITNESS:  Would you like this back, your Honor?

13     (Defendants' Exhibit 63 was offered and received in  
14     evidence.)

15     BY MR. SALAM:

16     Q.   And what was Mr. Stamatis's reaction when you told him  
17     about these other e-mail accounts?

18     A.   They -- well, both --

19     Q.   Listen my question.  I asked about -- we are going to go  
20     one by one.

21                So what was Mr. Stamatis's reaction?

22     A.   His initial reaction was -- I mean, he was in shock, and  
23     then he said something about he needed to -- I can't remember  
24     exactly what he said, but that's when he said he needed to let  
25     the court know of findings of -- as an agent of the court or

1 something like that, he needed to let the court know of these  
2 findings, something to that effect.

3 Q. Okay. And you testified about that yesterday, correct?

4 A. Yes.

5 Q. And you said he was shocked, correct?

6 A. Yes.

7 Q. Okay. Did he leave the room after this?

8 A. Yes. At some point, he left the room.

9 Q. Okay. Do you know where he went?

10 A. He testified in June that he went down by the Chicago  
11 River and just was staring into the river.

12 Q. Okay. And how did Mr. Shonder react?

13 A. He was in disbelief that the support and bduke hadn't been  
14 put through the 20 terms because I said "I'm pretty sure you  
15 guys have all looked through these e-mails, but I don't know  
16 if they have been through the 20 terms the same way the Yahoo!  
17 was," and he said, "No, it had to have been because we have  
18 thousands of e-mails here. There is no way it hasn't been."

19 And that's when I explained that I didn't believe  
20 that it had or I didn't know. I knew that I had never seen  
21 the terms, so I don't know exactly what should have been  
22 looked for, but I didn't think that they had done that.

23 So then he went into another room, and I don't know  
24 what he was looking at, but he came back shortly thereafter as  
25 well.

1 Q. Okay. So at some point, both Mr. Shonder and Mr. Stamatis  
2 were back in the room, correct?

3 A. Correct.

4 Q. And then what happened?

5 A. We continued with the meeting that we were having, the  
6 preparation that we were doing for the response.

7 Q. Okay. And how long thereafter did the meeting end?

8 A. Pretty abruptly. I mean, we continued for a little bit  
9 longer, but the meeting did end shortly thereafter.

10 Q. Okay. And I think you testified -- well, let me ask you:  
11 At some point, did you learn -- well, you testified that you  
12 learned your attorneys -- strike that.

13 I would like to hand you what I will mark -- and I  
14 believe I have provided previously, but we will find  
15 out -- Plaintiff's Exhibit 59, and if not, I have extra  
16 copies.

17 THE COURT: Did you just say --

18 MR. SALAM: 59.

19 THE COURT: I think you said Plaintiff's.

20 MR. SALAM: I'm sorry. Defendants' Exhibit 59.

21 THE COURT: I do have a Defendants' Exhibit 59. I  
22 have it.

23 MR. SALAM: Okay. Let me hand one to the witness.

24 THE COURT: I think it is on the screen.

25

1 BY MR. SALAM:

2 Q. I would ask you to review this, Defendants' Exhibit 59.

3 A. Okay.

4 Q. Okay. Do you recall that you received this on or about

5 May 31st?

6 A. Yes.

7 Q. I'm sorry. May 31st, 2019?

8 A. Yes.

9 Q. Okay. And the first page is from Travis Life to you, and  
10 it says: "Please call me," correct?

11 A. Correct.

12 Q. Okay. The second page is an e-mail from Mr. Leavens to  
13 you, correct?

14 A. Correct.

15 Q. And it appears he sent it to all your e-mails that he was  
16 aware of, correct?

17 Well, strike that.

18 He sent it to three of your e-mails, correct?

19 A. I see two of them.

20 Q. Strike that.

21 A. I see two of them. I see brentduke@yahoo.com and  
22 support@21centurysmoking.com.

23 Q. Correct. I am correct. I believe so. Okay.

24 And can you read for the record what that e-mail  
25 says?

1 A. "Brent - I am forwarding an order issued by Magistrate  
2 Judge Iain Johnston requiring your presence in his courtroom  
3 at 10:00 a.m. on June 4. It is absolutely essential and  
4 necessary that you appear in his courtroom on this date and at  
5 this time. The motions he references were a motion for a stay  
6 in the deadline for filing a response to the Plaintiff's  
7 motion for sanctions that was filed yesterday and a motion by  
8 Peter Stamatis and Steve Shonder to withdraw as counsel.  
9 Peter and Steve will be forwarding copies of both of those  
10 motions to you directly.

11 "As a result of recent events, we believe we have an  
12 irreconcilable conflict of interest with respect to our  
13 representation of 21 Century Smoking, Inc., and you. We are  
14 not in a position to continue to represent you or provide you  
15 with legal advice, and we urge you to immediately take steps  
16 to retain other counsel before Tuesday.

17 "Please promptly respond to this message and  
18 acknowledge that you have received this message.

19 "Thank you, Tom Leavens."

20 Q. And then attached to that is a copy of an order -- well,  
21 attached to that, you understand what's attached to that is  
22 the order that they referred to in the e-mail?

23 A. Okay.

24 Q. Excuse me?

25 A. Okay. I don't -- yes, I believe you.

1 Q. Well, do you recall seeing this as part of the e-mail that  
2 you received?

3 A. Yes.

4 Q. Okay. And subsequent to receiving this, you did arrange  
5 to be here on June 4th -- in this courtroom on June 4th, 2019,  
6 correct?

7 A. Yes.

8 MR. SALAM: Your Honor, I would ask that Defendants'  
9 Exhibit 59 be admitted.

10 THE COURT: Any objection?

11 MR. DAVIS: No.

12 THE COURT: All right. 59 will be admitted.

13 (Defendants' Exhibit 59 was offered and received in  
14 evidence.)

15 BY MR. SALAM:

16 Q. And to the extent Defendants' Exhibit 59 references  
17 "irreconcilable conflicts" -- do you see where it says that in  
18 the second to last paragraph?

19 A. Yes.

20 Q. Okay. Yesterday, you testified, I believe, in response to  
21 a question from Mr. Davis, about the motions to withdraw. He  
22 referenced the fact that the motion to withdraw, I believe,  
23 used the term "irreconcilable conflict" or some other term  
24 that ended with "conflict."

25 Do you recall that testimony?

1 A. Yes.

2 Q. Okay. And you explained what you understood that to mean,  
3 correct?

4 A. Correct.

5 Q. All right. And I believe it referred to "unintentional  
6 conduct," correct?

7 A. Correct.

8 Q. Okay. Now, I want to direct your attention to -- I  
9 believe you testified -- at some point in 2018, you had  
10 testified that Mr. Leavens came to see you in San Diego,  
11 correct?

12 A. Yes.

13 Q. Okay. And I believe -- I think you said it was in  
14 November of 2018, correct?

15 A. Yes. I don't know the exact time, but yes.

16 Q. Okay. I'm sure we will get that information in the course  
17 of the hearing.

18 But with respect to -- and that was the only time,  
19 whenever it was?

20 He came to visit you in San Diego only once, correct?

21 A. Yes.

22 Q. Okay. And as best you can recall, what did you understand  
23 the purpose of him coming to San Diego -- or what was the  
24 purpose of the meeting that you had with him when he came to  
25 see you in San Diego?

1 A. As I stated, there was clearly issues with discovery  
2 errors of some type with e-mail.

3 Q. Okay. In that meeting, did he say anything that led you  
4 to believe that the errors were your fault?

5 A. No.

6 Q. Did he say anything to you -- and by "fault" -- let me  
7 rephrase that -- or let me ask another question as  
8 well -- that you had done anything wrong?

9 A. No.

10 Q. Okay. Did you say anything that led you to believe that  
11 you had not provided to your attorneys anything that they had  
12 asked for?

13 A. No.

14 Q. But I think you said he did offer to quit, correct?

15 A. Correct.

16 Q. And what was your understanding as to why he offered to  
17 quit?

18 A. Because of this same conflict of errors having been made  
19 and that somehow would conflict us, I suppose.

20 Q. Okay. And at that time, the only error -- well, what  
21 errors -- did he mention what errors at that time?

22 A. Well, this is when they had come to the realization of the  
23 Yahoo! mishap, and so all the Yahoo! stuff, I believe, had  
24 been downloaded by this point, and that's what we were  
25 discussing.



1 Q. All right. Now, you decided not to accept his offer to  
2 stop representing you, correct?

3 A. Correct.

4 Q. Okay. And without disclosing any communications you may  
5 have had with other attorneys, besides former defense counsel,  
6 can you tell me why you chose not to accept his offer?

7 A. Because the case had been going on at this point for six  
8 years. He had probably the most knowledge of the case of  
9 anyone. I believe him to be an honest man. I don't believe  
10 him to ever -- he would never have done something  
11 intentionally wrong. So I couldn't see any reason why I would  
12 not want him to just remain as my lawyer in this case.

13 Q. Okay. And prior to this, you were very pleased with  
14 Mr. Leavens's work for you, correct?

15 A. Yes, I have always been pleased with Mr. Leavens's work,  
16 yes.

17 Q. I mean, he succeeded in getting you partial summary  
18 judgment in approximately 18 months, correct?

19 A. Correct.

20 Q. And after this meeting, when you did not accept his  
21 resignation, and up until -- and I'm not saying afterwards, he  
22 didn't, but I'm going to give a time period: Between this  
23 meeting and his withdraw that was granted by the court in June  
24 of this year, you still believe Mr. Leavens did a good job for  
25 you, correct?

1 A. Correct.

2 Q. Okay. You still think Mr. Leavens is honest?

3 A. Yes.

4 Q. Okay. Do you believe Mr. Leavens would ever intentionally  
5 do anything improper?

6 A. No.

7 Q. Okay. And you haven't seen anything to change that  
8 opinion since June 4th, correct?

9 A. No.

10 Q. Okay. And let me ask the question with respect to  
11 Ms. Liberman. I know she was only involved briefly.

12 But do you believe Ms. Liberman did anything  
13 intentionally -- or strike that.

14 Do you believe that Ms. Liberman is honest?

15 A. Yes.

16 Q. Do you believe that Ms. Liberman would ever do anything  
17 intentionally improper?

18 A. I do not.

19 MR. DAVIS: Objection, foundation.

20 THE COURT: I will sustain that.

21 Let's get some foundation. These are opinions as to  
22 people's truthfulness, and we don't have any foundation for  
23 any of this.

24 BY MR. SALAM:

25 Q. Okay. So Ms. Liberman was involved in this case -- when

1 did you first meet Ms. Liberman?

2 A. Shortly after beginning to work with their law firm.

3 Q. Okay. So that would have been somewhere in --

4 A. Late 2012.

5 Q. Late 2012. Okay.

6 And Ms. Liberman at some point stopped working on  
7 this case, correct?

8 A. Correct.

9 Q. And do you recall when that was?

10 A. I believe sometime after that settlement conference that  
11 we had in 2015, I believe.

12 Q. Okay. Well, regardless of the time, at some point, she  
13 stopped working on the case, correct?

14 A. Yes.

15 Q. All right. So based on the time that you interacted with  
16 her while she was working on the case, do you believe, based  
17 on those interactions, that she would ever intentionally do  
18 anything that would not be proper in handling the case?

19 MR. DAVIS: Same objection.

20 THE COURT: And what was the objection?

21 MR. DAVIS: Foundation.

22 THE COURT: All right. Overruled.

23 THE WITNESS: No, I do not believe she would do  
24 anything wrong.

25

1 BY MR. SALAM:

2 Q. I'm sorry? What was your answer?

3 A. I do not believe she would do anything dishonest or wrong,  
4 whatever. I can't remember the exact --

5 Q. Intentionally?

6 A. I don't believe she would do anything intentionally.

7 Q. She might make a mistake, but not intentionally -- well,  
8 strike that. That's a bad question.

9 With respect to Travis Life, do you recall when you  
10 first started dealing with Travis Life?

11 A. Shortly after Heather Liberman left the firm.

12 Q. Okay.

13 A. Or maybe even when she was still there. I think there was  
14 a little bit of overlap.

15 Q. Okay. And until he withdrew in June of this year, you had  
16 lots of dealings with him, correct?

17 A. Correct.

18 Q. Okay. He would often call you and ask you to search for  
19 e-mails?

20 A. Yes.

21 Q. Okay. He would ask you to review filings that he was  
22 making, correct?

23 A. Yes.

24 Q. Okay. As you sit here today, you can't remember specific  
25 filings, but he would ask you to review things, correct?

1 A. Yes.

2 Q. And your other attorneys would, too?

3 A. Yes.

4 Q. Okay. And what is your understanding as to what they  
5 would send you to review?

6 A. Just whatever we were working on at that time for the  
7 case. Whatever filing was going to be turned in, they would  
8 have me review it, if there was something pertinent that I  
9 could add or needed to edit or needed to research.

10 Q. Okay. And based on your interactions with Mr. Life, do  
11 you believe he would intentionally withhold documents?

12 A. Absolutely not.

13 Q. Do you believe he would intentionally destroy documents?

14 A. No.

15 Q. With respect to -- when did Peter Stamatis -- when did you  
16 first have Peter Stamatis start working on the case?

17 A. Shortly before the depositions.

18 Q. Okay. And I'm aware your deposition was in June of 2015.

19 A. Around that, yes. Around that time.

20 Q. Okay. And how did you come -- how did Mr. -- as best you  
21 can recall, how did Mr. Stamatis come to be involved in this  
22 case?

23 A. We came for the settlement conference.

24 Q. And who is "we"?

25 A. Mr. Leavens, I believe Heather Liberman was still with us

1 at that point, and myself. And after the settlement  
2 conference, Mr. Leavens informed me that in 30 years, he had  
3 tried like one case, so he didn't have the confidence, given  
4 the strength of our position, and he didn't want to be the  
5 weakness in the case, so he wanted to find a trial attorney  
6 who would be able to better suit our needs at that point,  
7 seeing as this case was not going to settle.

8 Q. And is he -- is that how you felt?

9 Did you know Mr. -- how did you come to retain  
10 Mr. Stamatis? Was that at the suggestion of Mr. Leavens or  
11 did you find Peter?

12 A. No, Mr. Leavens found Mr. Stamatis.

13 Q. Okay. And so Mr. Stamatis was involved from somewhere in  
14 around June of 2015 until he withdrew, correct?

15 A. Correct.

16 Q. And based on your dealings with Mr. Stamatis, are you  
17 aware of whether or not he ever intentionally withheld any  
18 information from Plaintiffs?

19 A. Absolutely not.

20 Q. Okay. Strike that.

21 Well, you are aware that he may have withheld --

22 THE COURT: You want to strike the answer or your  
23 question?

24 MR. SALAM: No, strike my "strike," please.

25 THE COURT: Okay.

1 MR. SALAM: Thank you.

2 BY MR. SALAM:

3 Q. You are aware that he did withhold documents that he  
4 considered privileged, correct?

5 A. Well, yes, of course.

6 Q. Okay. But other than documents that he withheld for  
7 privilege basis, you are not aware of him withholding any  
8 documents that otherwise -- well, you are not aware of him  
9 withholding any other documents, other than for privilege  
10 purposes, correct?

11 A. Correct.

12 Q. Okay. And do you think he would intentionally destroy any  
13 documents?

14 A. No.

15 Q. Okay. Do you consider Mr. Stamatis to be honest?

16 A. Yes.

17 Q. Okay. In fact, you had indicated that when he realized  
18 that the GoDaddy -- your GoDaddy accounts had not been subject  
19 to the 20 search terms, it was -- as soon as he realized that,  
20 that's when he informed you, or shortly thereafter, that he  
21 was going to have to tell the court this, correct?

22 A. Correct.

23 Q. Okay. And last, but not least, Steven Shonder, when was  
24 the first time you met Steve Shonder face to face?

25 A. At that meeting.

1 Q. On May 30th?

2 A. Correct.

3 Q. Basically, you met him once, and he was withdrawn the next  
4 day?

5 A. Something like that, yes.

6 Q. Okay. Had you had phone communications with him prior to  
7 May 30th?

8 A. He may have been on calls, but I don't think I ever just  
9 had a call with him.

10 Q. Okay. So other than May 30th, can you describe  
11 what -- you said he may have been on phone calls?

12 A. Correct.

13 Q. Was he ever an attorney asking you to do searches for  
14 anything, other than May 30th, excluding May 30th?

15 You said he may have been on phone calls.

16 Can you recall what involvement he had in  
17 communicating with you in those phone calls?

18 A. I don't recall.

19 Q. Okay. Do you recall if he ever asked you to search for  
20 any documents?

21 A. It's possible. I mean, I feel like all of the attorneys  
22 at some point asked me to search for things.

23 Q. Okay. Well, in limited interactions you had with  
24 Mr. Shonder, do you think he would have intentionally  
25 destroyed any documents?



1 A. No.

2 Q. Do you think he would have intentionally withheld  
3 non-privileged documents?

4 A. No.

5 Q. Okay. Based on your dealings with Mr. Shonder, you  
6 believe he is an honest attorney?

7 A. Yes.

8 Q. Now, at some point, and I'm not sure exactly when, you  
9 came to understand that there had been a problem with your  
10 Yahoo! e-mail account not being searched, correct?

11 A. Correct.

12 Q. And I think your testimony was that was -- the first time  
13 you learned about that was somewhere on or about March 18th,  
14 2018, or 14th, 2018, when Mr. Life called you and asked you to  
15 search for certain e-mails, correct?

16 A. Yeah, I think it was maybe a few weeks after that, though,  
17 that they kind of figured out the actual realization that the  
18 Yahoo! had not been searched for the full number of terms. I  
19 don't know if the realization was made that soon.

20 I think it was after seeing these e-mails, and  
21 then -- I'm not sure I was involved in these discussions, but  
22 then at some point shortly thereafter, Travis called me and  
23 said that they needed my password, and they were going to have  
24 4Discovery do the full search of the e-mails. And in my mind,  
25 I'm thinking "If you could do that, why didn't we do this from

1 the beginning to all of my e-mails?" I didn't understand why,  
2 at that point, we were doing that to the Yahoo! e-mail, and I  
3 had been wasting thousands of hours searching e-mails. So I  
4 was kind of blown away that you could even do that. I didn't  
5 realize that that was even an option.

6 Q. Okay. So let me unpack that a little.

7 So when Mr. Life called you on or about March 14th or  
8 15th of 2018 and asked you to search for -- I think we have  
9 looked at the e-mail -- search for, I think it was related to,  
10 Kirti Saraswat, Frank Gu, Ms. Wood, when he called you at that  
11 time and asked you to search, at that point, you weren't aware  
12 that there was -- you weren't yet aware that the problem -- or  
13 one problem was that your Yahoo! e-mail account had not been  
14 subject to those 20 search terms, correct?

15 A. Correct.

16 Q. Okay. And somewhere within a few weeks thereafter, you  
17 believe that's when you first found out about it from  
18 Mr. Life, correct?

19 A. Correct.

20 Q. And your understanding was that is about -- you would  
21 have -- they would have told you as soon as they figured out  
22 that that was the problem, correct?

23 A. Correct.

24 Q. And so when they told you that -- and when I say "they,"  
25 who was it that told you, if you recall?

1 A. I believe that was Travis.

2 Q. Okay.

3 A. I want to say all of this was happening in March. Maybe  
4 by May, they kind of figured it out, and that's when he told  
5 me. I don't remember the exact dates, but I want to say March  
6 was the first searching for the terms, and sometime in May, he  
7 then reached out to me and kind of explained.

8 Q. Okay. And you remember we looked in one of the exhibits.  
9 It was the e-mail chain that included 4Discovery, where they  
10 said the download was successful, and that was May 8th?

11 A. Correct.

12 Q. Does that refresh your recollection as to when Mr. Life  
13 explained to you that the problem was that your Yahoo! e-mail  
14 account had not been searched?

15 A. Correct.

16 MR. SMITH: Objection, your Honor, it has been asked  
17 and answered.

18 THE COURT: Well, it has been answered again. So we  
19 have covered that ground.

20 MR. SMITH: Okay.

21 THE COURT: It is 4:16.

22 BY MR. SALAM:

23 Q. So on or about the time 4Discovery downloaded the e-mails,  
24 somewhere near there is when you first learned that there was  
25 a problem that your Yahoo! e-mail account had not previously

1    been subject to the 20 search terms, correct?

2                   MR. SMITH:   Same objection, your Honor.

3                   THE COURT:   Unless this is foundation for something  
4   totally new --

5                   MR. SALAM:   It is.   It is, your Honor.

6                   THE COURT:   Okay.   All right.   He has talked about  
7   this multiple times.   Why don't you get to that subject.

8                   MR. SALAM:   Okay.

9   BY MR. SALAM:

10   Q.   So when Mr. Life informed you that they were going to need  
11   your credentials to download the e-mails and search them, can  
12   you -- what was your reaction?

13   A.   Well, as I said, I was kind of shocked that that was even  
14   something 4Discovery could do because why didn't we do that  
15   from the beginning instead of wasting thousands of my hours  
16   searching for e-mails.   I mean, I had been searching for  
17   e-mails constantly, and if that was something that could be  
18   done, which I didn't realize, that would have sure made things  
19   a lot easier.

20   Q.   So this term "sanctions," I believe you recall -- in your  
21   prior testimony, Mr. Davis asked you about your understanding.

22                   Do you recall being asked about your understanding of  
23   sanctions?

24   A.   By my attorneys?

25   Q.   No, by Mr. Davis in your previous testimony.

1 A. Oh, yes.

2 Q. Do you recall that?

3 A. Yes.

4 Q. And what was your understanding of the term -- well, who  
5 did you first hear the term "sanctions" from?

6 A. Former defense counsel. I don't recall which one.

7 Q. Okay. Do you recall approximately when you would have  
8 heard that?

9 A. I would venture to guess it was around the time that Tom  
10 Leavens came to visit, somewhere in that range.

11 Q. All right. And at that time, what did you understand the  
12 term "sanctions" to mean?

13 A. I mean, I knew it was some type of penalty or -- yes, some  
14 type of penalty, like sanctions against a country, penalties  
15 against a country. So I knew it was some type of penalty, and  
16 I didn't know the full details of the scope of it, but I knew  
17 it was not a good thing.

18 Q. All right. On a scale of one to ten, how serious did you  
19 think the issue was about sanctions?

20 A. Probably fairly low because I knew it couldn't -- nothing  
21 intentional was done in any way. So I probably didn't believe  
22 that sanctions could be that serious if nothing intentional  
23 was done. That probably would have been what I thought at  
24 that time.

25 Q. You are aware, as you sit here today, that the issue of

1 sanctions that we are discussing here or having a hearing on  
2 is very serious, correct?

3 A. Yes, it is a ten out of ten. I was unaware of that.

4 Q. Okay. And prior to that, when did you first realize the  
5 seriousness of the sanctions issue we are dealing with here?

6 A. June 4th, I believe, is when we were sitting in this  
7 courtroom.

8 Q. Okay.

9 A. In 2019.

10 Q. Thank you.

11 MR. SALAM: I'm doing my best to finish up so you  
12 have time to deal with the man in the orange jumpsuit.

13 THE COURT: Okay.

14 (Brief pause.)

15 MR. SALAM: Can we take a short break, your Honor?  
16 And I should be able to figure out exactly what I need to  
17 address to finish this off.

18 THE COURT: Five minutes tops.

19 MR. SALAM: That would be fine, your Honor.

20 (Recess taken.)

21 BY MR. SALAM:

22 Q. Mr. Duke, I would like to direct your attention to Yahoo!  
23 Chat. Do you remember some of your testimony?

24 You testified about Yahoo! Chat?

25 A. Yes.

1 Q. I believe that was Monday, correct?

2 A. Yes.

3 Q. Okay. On your -- to the extent you would have used Yahoo!

4 Chat in your business, 21centurysmoking.com, did you use

5 that -- how did you access the Yahoo! Chat service?

6 A. Like through the -- when you load up your Yahoo! e-mail,

7 there was like a thing on the left for messenger or whatever.

8 So within your Yahoo! e-mail program, you could get to

9 messenger.

10 Q. So you would be going through your web browser, correct,

11 to get to Yahoo!?

12 A. Correct, yes.

13 Q. On your laptop, did you have what -- do you understand, if

14 I say "Yahoo! client" or "Yahoo! application," do either of

15 those terms mean anything to you?

16 A. I would have had those on desktops 20 years ago, but not

17 on my laptop.

18 Q. Okay. So at the time you provided -- 4Discovery imaged

19 your laptop, I believe it was, December 2014; is that correct?

20 Is that what you testified to?

21 A. Correct, yes.

22 Q. Okay. Sorry. I was trying to not talk over you so the

23 court reporter --

24 A. Oh, sorry.

25 Q. I think I'm the one who needs to apologize.

1 But in any event, so at the time, you would have been  
2 communicating with Ms. Saraswat by Yahoo! Chat? You did do  
3 that at some time, correct?

4 A. Yes.

5 Q. Okay. And you would have been communicating with her  
6 through -- you would have accessed Yahoo! Chat through your  
7 web browser, correct?

8 A. Correct.

9 Q. So do you have an understanding as to whether or  
10 not -- well, if you wanted to save a Yahoo! Chat, whether it  
11 was Ms. Saraswat or somebody else, what would you do?

12 At the time of the chat, if, for some reason, you  
13 wanted to save it, what would you do?

14 A. Like I'm saying 10 years ago, 11, 12 years ago, when I was  
15 doing it on a desktop, I would need to e-mail it to myself.  
16 But for the last whatever number of years that I was using it,  
17 it was just within the e-mail program. So the only  
18 time -- only the really old ones would I have e-mailed to  
19 myself. The rest would have been just basically -- I wouldn't  
20 have to save them. They were there.

21 Q. Well, did you ever e-mail chats -- even if you were  
22 accessing it through the web browser, do you ever -- do you  
23 recall if you ever e-mailed a chat to yourself at  
24 brentduke@yahoo.com?

25 A. I don't think when they were on the web browser because



1 they just saved. I mean, they were automatically there. So I  
2 didn't have to -- I could see them by just loading my e-mail.

3 Q. Are you aware of whether or not there was a Yahoo! Chat  
4 with Ms. Saraswat that -- well, I believe -- let's find the  
5 Plaintiff's exhibit.

6 There was a Plaintiff's exhibit that, I believe, was  
7 a chat with Ms. Saraswat?

8 A. Yes, I recall it, yes.

9 Q. Okay. And that showed up in your brentduke -- that showed  
10 up in your brentduke@yahoo.com e-mail?

11 A. Correct.

12 Q. So how did that happen if you were using your web browser?

13 A. This would have had to have been on some type of desktop  
14 somewhere that I needed to e-mail it to myself to save it.  
15 It's the only reason I would have e-mailed it to myself.

16 Q. Okay. But on your laptop, you did not have a Yahoo! Chat  
17 client, right?

18 A. No, this would have been way before my laptop existed.  
19 This would be like 2009, 2008. It would be way in the past.  
20 I got my laptop in 2011.

21 Q. Okay. So at the time your laptop was imaged by  
22 4Discovery, you did not have a Yahoo! Chat client or  
23 application residing on your computer, correct?

24 A. I never had it on my laptop, no.

25 MR. SALAM: Can I just have one moment, your Honor?

1 THE COURT: Sure.

2 (Brief pause.)

3 BY MR. SALAM:

4 Q. So if you e-mailed a chat with Kirti to your Yahoo!, then  
5 you must have been using a non-web-based Yahoo! Chat at some  
6 point, correct?

7 A. Yes, before they integrated it into the actual Yahoo! Mail  
8 program, you had to use a Yahoo! Messenger client or whatever  
9 it was.

10 Q. So I'm trying to understand because I know the -- I think  
11 it was September of 2010 was the Yahoo! Chat or the chat that  
12 you e-mailed to yourself from -- to you at yahoo.com.

13 Do you remember that exhibit?

14 A. Yes.

15 Q. Okay. What computer were you using in September of 2010  
16 that you would have had a chat with Ms. Saraswat?

17 A. It either would have been on my wife's old computer or my  
18 work computer at -- I was at Roach Ag, so I would have been at  
19 Roach Ag at work, but I think by 2010, I don't think I was  
20 working there anymore. So I think it would have been probably  
21 my wife's desktop.

22 Q. Okay. Your wife's desktop.

23 And is that one of the computers that's -- that was  
24 provided recently, the eight computers listed?

25 A. I'm not sure that we still have that computer. There was

1 eight computers that were searched. I'm not sure if that is  
2 one of them.

3 Q. Okay. And if we could find the -- you are not sure, as  
4 you sit here today.

5 Is there anything that would allow you to determine  
6 whether or not that's one of the computers that was collected,  
7 as indicated in the status report?

8 A. I don't believe it is one of the computers, but I'm not a  
9 hundred percent sure. I mean, we searched our entire house  
10 for every computer we could find, but I mean this is a  
11 computer that hasn't been in use for nine years, ten years.

12 Q. Okay. And the computer that you used at work, at Roach  
13 Ag, how long -- when were you last at Roach Ag?

14 A. 2009-ish, somewhere in there.

15 Q. Okay. 2009?

16 A. Somewhere in there, yes.

17 Q. Okay. All right. And any idea what happened to that  
18 computer after you left Roach Ag?

19 A. No. I wasn't working there anymore.

20 Q. But if you had had -- strike that.

21 MR. SALAM: Let me check Plaintiff's exhibits and see  
22 if I have any more questions, and if not, I will move to admit  
23 a few exhibits, and we should be finished -- I should be  
24 finished with this round of Mr. Duke.

25 Hold on one second here.

1 (Brief pause.)

2 BY MR. SALAM:

3 Q. I'm going to direct your attention to Plaintiff's  
4 Exhibit 17. Just for the record here, it is an e-mail from  
5 Brent Duke to Brent Duke dated September 13th, 2010.

6 A. Yes.

7 Q. Okay. So that's a Yahoo -- is that -- this e-mail, does  
8 that show a Yahoo! Chat?

9 A. Yes.

10 Q. Okay. So you weren't currently -- you didn't have your  
11 laptop at the time of this -- the laptop that was imaged, your  
12 laptop that was imaged in December of 2014, you did not have  
13 at the time of -- as of September 13th, 2010, correct?

14 A. Correct.

15 Q. All right. And you think you would have e-mailed this to  
16 yourself because you must have been using, I think you  
17 testified, your wife's desktop?

18 A. I was using some desktop, or this was super important to  
19 me, and this was the web-based thing, but it was so important  
20 to me, I wanted it in my e-mail so it would be easier to  
21 check. I mean, those are the only two reasons I could think  
22 that I would have e-mailed it to myself.

23 Q. All right. So in addition to it either not being on the  
24 web, you still would have -- even if it was on the web, it may  
25 have been so important or interesting or you wanted to save

1 it, you might still e-mail it to yourself?

2 A. Just so it would be easier to see, yes, so it doesn't get  
3 lost somewhere in five messages, and it is something I can  
4 just turn to really quickly in an e-mail.

5 Q. Now, you said you stopped working at Roach Ag somewhere in  
6 2010?

7 A. Yes, 2009, 2010, somewhere in there.

8 Q. And you indicated that you --

9 A. Or 2009.

10 Q. 2009?

11 A. Yes, by that time 21 Century Smoking was far along, so  
12 2009 would be the latest.

13 MR. SALAM: Could I ask that you not scroll the  
14 exhibit. I'm sorry. It is disturbing me.

15 MS. RICH: Yes. Sorry.

16 BY MR. SALAM:

17 Q. All right. So you left Roach Ag sometime in 2009, right?

18 A. I believe so, yes.

19 Q. And that's the work computer you were referring to,  
20 correct?

21 A. Yes.

22 Q. Okay. In 2009.

23 So when you said it would have been on your work  
24 computer, you meant the computer you were using at Roach Ag,  
25 correct?

1 A. Correct.

2 Q. And that was a computer they provided you, correct?

3 A. Yes.

4 Q. Okay. And you weren't allowed to take that with you when  
5 you stopped working at Roach Ag?

6 A. No, it was not my computer.

7 Q. Okay. And your wife's desktop that you think you may have  
8 been using or may have also chatted with Kirti  
9 Saraswat -- well, strike that.

10 Could you, again, tell me what -- you indicated maybe  
11 you had used your wife's old desktop to chat with Kirti?

12 A. Yes.

13 Q. And do you know if her old desktop would have had the  
14 Yahoo! client on it or only if -- strike that.

15 Do you know if her old desktop would have had the  
16 Yahoo! client application?

17 A. It is a pretty old computer. Yes, I believe it would  
18 have.

19 Q. Okay. When you say "pretty old," give me, if you can, a  
20 year.

21 A. It probably was purchased in 2003.

22 Q. '03?

23 A. Yes, something like that.

24 Q. And you were still using it -- or you might have still  
25 used it as late as 2010?

1 A. Still using it in 2011, yes.

2 Q. You were?

3 A. Yes.

4 Q. Okay. And do you know what happened to that computer?

5 A. As I said, I have no clue. Like we searched, and the  
6 computers, we found eight computers. We didn't find that one.

7 Q. Okay. And you don't know when you -- so you don't know  
8 what happened to it, correct?

9 A. No.

10 Q. Do you think you may have thrown it out sometime prior  
11 to --

12 A. It may be -- moving from here, from Chicago, to  
13 California, it might have got lost in the move. I don't even  
14 have a guess.

15 Q. Do you recall having it in Chicago before the move?

16 A. Yes.

17 (Brief pause.)

18 MR. SALAM: Okay. Bear with me, your Honor. I'm  
19 just flipping through to make sure I have no other exhibits  
20 from Plaintiffs that I needed to address.

21 All right. Your Honor, just because my co-counsel  
22 gave me a list here of exhibits I have referenced, but may not  
23 have moved to admit, I would just like to quickly run through  
24 those.

25 I believe Plaintiff's Exhibit 1 has been admitted,

1 correct? That's Plaintiff's, not Defendants', but it is on my  
2 list here.

3 THE COURT: Here is how I have them: I have them in  
4 the order that you used.

5 So I have got you starting at 37, 74, 76. You  
6 referenced 31.

7 MR. SALAM: Okay. And Plaintiff's 76 has been  
8 admitted, correct?

9 I would move to admit Plaintiff's Exhibit 76 if it  
10 has not been.

11 THE COURT: Let's do it this way --

12 MR. SALAM: Sorry, your Honor.

13 THE COURT: Tell me what -- go through your list.  
14 Tell me what exhibits you are moving for admission of.

15 MR. SALAM: Plaintiff's Exhibit No. 1.

16 THE COURT: Okay. What else?

17 MR. SALAM: Which is the e-mail from Mr. Stamatis.  
18 It is the cover to the, approximately, 122 pages that Mr. Duke  
19 sent to --

20 THE COURT: Just go through the list.

21 MR. SALAM: Plaintiff's Exhibit 1.

22 THE COURT: Yep.

23 MR. SALAM: Plaintiff's Exhibit 66.

24 THE COURT: 66.

25 MR. SALAM: Plaintiff's Exhibit 76.



1 THE COURT: 76.

2 MR. SALAM: Defendants' Exhibit 4.

3 THE COURT: D-4.

4 MR. SALAM: Defendants' Exhibit 57.

5 THE COURT: D-57.

6 MR. SALAM: Defendants' Exhibit 62.

7 THE COURT: Okay.

8 MR. SALAM: Let me check.

9 Defendants' Exhibit 10, but I may need to lay a quick  
10 foundation. I don't know if I asked any questions about that.

11 Well, I have not asked questions about it, but we can  
12 address it when we do the cleanup on exhibits. It was just  
13 establishing the Bates numbers of the Yahoo! production, the  
14 15,000 pages --

15 THE COURT: Okay.

16 MR. SALAM: -- is what I wanted it for.

17 Plaintiff's Exhibit -- I'm sorry -- Defendants'  
18 Exhibit 23, which was the June 29th e-mail from GoDaddy  
19 support back to Mr. Duke, and the related e-mails that he was  
20 questioned about by Plaintiff's counsel, but I don't believe  
21 anybody ever moved to admit them. I would seek to admit that  
22 group exhibit.

23 THE COURT: Again, just give me a list of these.

24 MR. SALAM: Okay. Defendants' Exhibit 23.

25 THE COURT: Okay.

1 MR. SALAM: And LS Exhibit 18.

2 THE COURT: All right. So you are moving for  
3 admission of Plaintiff's Exhibit No. 1, Plaintiff's  
4 Exhibit No. 66, Plaintiff's Exhibit 76, Defendants' Exhibit 4,  
5 Defendants' Exhibit 57, Defendants' Exhibit 62, Defendants'  
6 Exhibit 23, and LS Exhibit 18, correct?

7 MR. SALAM: And Defendants' Exhibit 10.

8 THE COURT: Okay.

9 MR. SMITH: No objections to any of those, your  
10 Honor.

11 THE COURT: Okay.

12 MR. DAVIS: No objections from Plaintiff, your Honor,  
13 just to note that we are moving -- on Plaintiff's list, this  
14 is what I raised at the beginning of my presentation -- or the  
15 examination, was our motion that's pending has our Exhibits 1  
16 through 61 attached, that were already filed and of record.  
17 They are part of the record. So I moved them all to be  
18 formally admitted. There has been no objection to those  
19 documents at this time.

20 THE COURT: Okay. Let's finish what we are in the  
21 middle of.

22 MR. DAVIS: Got it.

23 THE COURT: No objections to Plaintiff's  
24 Exhibit No. 1, Plaintiff's Exhibit 66, Plaintiff's Exhibit 76,  
25 Defendants' 4, Defendants' 57, Defendants' 62, Defendants' 10,

1 Defendants' 23, and LS-18.

2 MR. DAVIS: No objection.

3 THE COURT: Okay.

4 MR. SALAM: For the record, I believe we have already  
5 admitted 58 and 59 of Defendants'.

6 THE COURT: I want to make sure there is no objection  
7 to those exhibits I have just identified.

8 No objection, those will be admitted.

9 MR. SALAM: Thank you.

10 THE COURT: Okay. Mr. Davis, your point is you have  
11 got Plaintiff's Exhibit 1 through 61 that are attached, and  
12 you just want to move for admission now, correct?

13 MR. DAVIS: Yes.

14 THE COURT: Okay.

15 MR. DAVIS: And in addition, the balance of our  
16 exhibits on our list are -- well, we can take them as we go,  
17 but if we are admitting 76, we also move 77 into evidence.  
18 That was the second exhibit that Mr. Salam presented his  
19 witness. I believe I used it also.

20 THE COURT: So Plaintiff's 77?

21 MR. DAVIS: Yes.

22 THE COURT: Okay. Any objection to Plaintiff's 77  
23 coming in?

24 MR. SALAM: No objection, your Honor.

25 THE COURT: Okay. Plaintiff's Exhibit 77 will be

1 admitted.

2 (Plaintiff's Exhibit 77 was offered and received in  
3 evidence.)

4 THE COURT: 1 through 61.

5 It is now 4:52. I'm waiting to hear the sally port  
6 door open and the marshals to come in. I also have to go sign  
7 off on some search warrants.

8 Mr. Smith, I don't even know -- I mean, it is late in  
9 the day. You have just heard all the testimony. I don't even  
10 know if, right now, you could reasonably give me an estimate  
11 on how much time. If you can, tell me. But if you don't, I  
12 would understand that it would be difficult for you to give me  
13 an estimate.

14 MR. SMITH: Not really, your Honor, but I suspect it  
15 is an hour or more, to be candid, and it may be less if we  
16 wind up breaking and I'm able to work through it. I  
17 really -- I know you wanted to ask that question.

18 There is sort of a housekeeping matter, and I'm  
19 concerned we will lose you momentarily.

20 THE COURT: You will, but I'm going to pause you and  
21 say I do a subject matter, I finish it, and then I move on to  
22 the next subject. So when people try to change, I stop you.

23 MR. SMITH: Just put a flag up on that.

24 THE COURT: We will come back.

25 What do you think for your examination? Can you give

1 me an estimate now? Again, I know it is late in the day.

2 MR. HOLEVAS: It would be difficult, but I don't  
3 anticipate it would be an hour. I do not think it would be  
4 that long, your Honor.

5 THE COURT: Okay.

6 MR. WOLFE: Same answer.

7 THE COURT: Okay. All right. So we got the 7th,  
8 part of the morning set aside. So I think we would be able to  
9 get that cross -- that exam -- we will just call it  
10 "examination," that part of the examination complete. So I  
11 think we can get that done on the 7th.

12 Now, what's the other issue?

13 MR. SMITH: My point simply, your Honor, was it is  
14 very clear to me now that on the 7th that's about the most we  
15 would get done. It is extraordinarily burdensome for  
16 Ms. Liberman Van Dyke to come up from Texas. I would like to  
17 ask her to be excused from that session. We, obviously, know  
18 that there will be more beyond that at some point, and I  
19 mentioned this to other counsel. I don't think she will be  
20 reached that day, and I just wonder if that's possible.

21 THE COURT: I don't -- she shouldn't have to sit here  
22 if she's not going to be called. She can come up and sit if  
23 she wants, but I don't want to require her to sit here if she  
24 is never going to hit the witness stand. It seems burdensome.

25 MR. SALAM: I have a similar issue. It's very

1     difficult and expensive for my client to come back and forth,  
2     and my concern is that --

3             THE COURT: Did you hear the part of me where I take  
4     on a subject, and then I deal with it, and then I move on to  
5     the next issue? So I resolve it.

6             MR. SALAM: I'm sorry.

7             THE COURT: Okay. Anybody have a problem with  
8     Ms. Liberman being excused on November 7th?

9             MR. von OHLEN: No problem.

10            MR. DAVIS: No, your Honor.

11            THE COURT: All right. Ms. Liberman will be excused  
12    on November 7th.

13            MR. SMITH: Thank you, your Honor.

14            THE COURT: Now, let's go to your issue.

15            MR. SALAM: So my concern is that it is highly  
16    unlikely, I fear, that Mr. Duke will be done on November 7th  
17    with the two hours the court has, and then we have got to pick  
18    other dates and arrange for him to come back.

19            So he is going to end up spending money coming out  
20    for two hours, and then going to have to come back again, and  
21    I'm wondering is there a chance that we can pick, instead of  
22    doing two hours, pick a day where you are available so we know  
23    for sure that Mr. Duke will be done.

24            THE COURT: Let me tell you folks this: I have been  
25    here a little over six years now, six and a half years. There

1 is a reason why Judge Jensen is here. The Administrative  
2 Office of the U.S. Courts authorized an additional position,  
3 an additional magistrate judge position for the United States  
4 District Court for the Northern District of Illinois, Western  
5 Division, because for six years, according to their numbers  
6 and their study, I was the busiest magistrate judge in the  
7 country. In light of that, they were able to get an  
8 additional magistrate judge position available, and she has  
9 now taken half my caseload.

10 In addition to that, the chief judge's office was  
11 kind enough to give me what all the judges in Chicago get.  
12 The term is a "calendar adjustment" -- Is that what we call  
13 it? -- a "calendar adjustment," also known as a sabbatical.  
14 That starts November 1st, tomorrow, for three months. So I'm  
15 already dipping into my vacation time for this.

16 So whatever you think the value of your time is, kind  
17 of value it with me, because I'm already coming in on the 7th.

18 So I can't put you in the afternoon because I have  
19 already jammed in a bunch of other matters to try to get  
20 things done on the 7th, and, also, in reasonable reliance upon  
21 me being gone, my staff made the wise choice of getting out of  
22 dodge.

23 MR. SALAM: I will make -- Mr. Duke, obviously, will  
24 come on the 7th if that's when we are here. Then he will be  
25 here.

1 THE COURT: Okay. Here is what we are going to do --

2 MR. SALAM: Because, your Honor --

3 THE COURT: Hold on.

4 MR. SALAM: I'm sorry.

5 THE COURT: We will see what we can do to get

6 Mr. Duke done on the 7th, so he doesn't have to come back,

7 okay?

8 MR. SALAM: Thank you, your Honor.

9 THE COURT: I have some criminal matters, again, that

10 I have tried to squeeze in.

11 You should talk among yourselves about dates to have

12 additional testimony time, and I will tell you dates to avoid

13 because I will not be here.

14 November 19th through December 2nd, I'm gone. You

15 can pretty much forget about December -- well, yes,

16 December 23rd, and that's -- we are closed. December 23rd

17 through January 1st, I'm out.

18 So you have got a tiny window to get this done,

19 squeeze it in there. So figure out the time frames, a couple

20 dates, within that window. Obviously, don't do it on the days

21 I'm gone.

22 Yvonne, do you have any other dates that are on CEO

23 that I need to avoid?

24 THE CLERK: No, your Honor.

25 THE COURT: That's it? You have got to leave more,



1 Yvonne. Come on.

2 Are Chuck's dates on here? Is Chuck going anywhere?

3 Chuck, are you listening?

4 THE CLERK: He is, your Honor.

5 THE COURT: Okay. Yes, that's fair.

6 You are looking -- your best bet -- oh, you know

7 what? That's what we can do.

8 Why do we have Pierre Hayes on the 3rd? Is that like

9 a placeholder, December 3rd?

10 THE CLERK: I believe so, your Honor.

11 THE COURT: Here is what we are going to do: Take a

12 look at December 18th as an option.

13 We have one pro se in December. We will move that.

14 Who has got that case?

15 Hold on one second here.

16 I'm not doing pro se while I'm gone.

17 All right. So how does December 18th look for folks?

18 I will come back in for that.

19 MR. SMITH: One second, your Honor. I need to turn

20 on my phone.

21 MR. HOLEVAS: Judge, while I might be the least

22 important person here, Judge Kennelly has got a case that he

23 took over for Judge Kapala that we are going to try starting

24 on the 12th here, and it is going to go into that next week.

25 THE COURT: December 12th?

1 MR. HOLEVAS: Yes, it starts on the 12th.

2 THE COURT: Which case is that?

3 MR. HOLEVAS: It is a case we got summary judgment in  
4 the Seventh Circuit.

5 THE COURT: Oh, you can't say those words. You can't  
6 say that case.

7 MR. HOLEVAS: Arctic Cat.

8 THE COURT: Don't say it.

9 2008?

10 MR. HOLEVAS: Yes, your Honor.

11 THE COURT: Do you know what courtroom he is using?  
12 We should have that one available.

13 MR. HOLEVAS: And, Judge, in all fairness to all  
14 counsel, I'm not going to be the lead trial counsel in the  
15 case. So if I can step away and be present on that day, and  
16 if it works for everybody else, and it is good for you --

17 THE COURT: You said Judge Kennelly has got it from  
18 the 12th through when?

19 You have got one claim left in that thing.

20 MR. HOLEVAS: Judge, I will share with you: 30 hours  
21 of trial time, 15 for the plaintiff, 15 for the defendant, so  
22 it is going to move pretty quickly.

23 THE COURT: Okay. And it is December 12th it starts?

24 MR. HOLEVAS: The 12th.

25 THE COURT: So December 18th --

1 MR. HOLEVAS: I should be okay.

2 THE COURT: You should be okay.

3 I will talk to him. You might want to get out of  
4 there.

5 Does December 18th work for everybody else?

6 MR. SALAM: It works for Defense counsel, your Honor.

7 MR. DAVIS: It works for Plaintiff, your Honor.

8 THE WITNESS: Your Honor, is that in lieu of  
9 November?

10 THE COURT: No, we are going to try to finish you up  
11 November 7th.

12 THE WITNESS: Okay. Thank you.

13 MS. RICH: Mr. Leavens is scheduled to be in Utah  
14 that day, but if he absolutely has to, he can be here for it.

15 THE COURT: Well, I don't know who is calling who as  
16 witnesses and all those kinds of things.

17 MR. SMITH: If it has to be, it will be.

18 THE COURT: And we will get it done with the two  
19 hours on the 7th and then full day on the 18th of December.

20 MS. RICH: I don't think anyone has suggested that we  
21 thought that would be enough time.

22 THE COURT: You thought it would be enough time. So  
23 you are going to need more time than just the 18th?

24 MR. SMITH: No, we are not asking for any more time,  
25 your Honor. We would hope that it would get done as far as we

1 are concerned. I don't know about the other lawyers.

2 THE COURT: Okay. You've got the two hours. We are  
3 going to try to get Mr. Duke done on November 7th. If I give  
4 you a full day December 18th, what are the odds of everything  
5 getting wrapped up?

6 MR. von OHLEN: Zero.

7 THE COURT: Zero. Okay.

8 Anybody else got a more optimistic view?

9 MR. SALAM: I reserve my -- I'm assuming I won't  
10 really need to put on anything in my case-in-chief. I still  
11 reserve the right to put Mr. Duke back on the stand depending  
12 on rebuttal or what else happens.

13 THE COURT: So maybe this is good news for  
14 Mr. Leavens. I am going to give you the 18th, and I'm going  
15 to give you another day, another eight-hour day. You figure  
16 out a day that I didn't just block off, and we will give  
17 you --

18 MR. SMITH: You mean in that window between your  
19 absences?

20 THE COURT: Yes.

21 MR. SMITH: We can discuss that between ourselves.

22 THE COURT: Talk among yourselves and find another  
23 day. So you will get the two hours on the 7th, you will get a  
24 full day on the 18th, and another full day when I will be  
25 around, okay?

1 Does that work?

2 MR. SALAM: I will hope -- I can see finishing up  
3 with that. Thank you, your Honor.

4 THE COURT: Okay. All right. I have got to go talk  
5 to the U.S. attorneys, and then we are going to have the  
6 marshals come in.

7 Have a good day, everybody.

8 MR. von OHLEN: Thank you, your Honor.

9 MR. SALAM: Thank you, your Honor.

10 MR. DAVIS: Thank you, your Honor.

11 MR. BISBIKIS: Thank you, your Honor.

12 (The hearing was adjourned to November 7, 2019, at  
13 9:00 o'clock a.m.)

14 CERTIFICATE

15 I certify that the foregoing is a correct transcript from  
16 the record of proceedings in the above-entitled matter.

17 */s/Heather M. Perkins-Reiva* *November 4, 2019*

18 \_\_\_\_\_  
19 Heather M. Perkins-Reiva  
Official Court Reporter

\_\_\_\_\_  
Date

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